91-1812

Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH LAND TITLE
INSURANCE CO., *et al.*,
Petitioners,

v.

CAROLYN BURNS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that the absence of a federal cause of action defeats federal question jurisdiction even though the action is based entirely on a federal tax statute, and the interpretation of that statute is the crucial issue presented.

LIST OF PARTIES and RULE 29.1 LIST

The parties to this proceeding (and to the case below) are:

Petitioners

Commonwealth Land Title Insurance Company;
Northwestern Abstract Company, Inc.;
Industrial Valley Title Insurance Company;
Chicago Title Insurance Company;
Professional Abstract and Assurance Corp.;
Continental Title Insurance Company;
Legal Abstract Company

Respondents

Carolyn Burns, as Executrix of the Estate of Juliette L. Echols, deceased; Attilio Chiarrochi, Administrator of the Estate of Philomena Chiarrochi, deceased; Mau Thi Le; Anne Marie Smith; Gary Voliner and Cindy Voliner, husband and wife; and May Frankel; each individually and on behalf of persons similarly situated.

Disclosure Pursuant to Rule 29.1:

Commonwealth Land Title Insurance Co. is a wholly-owned subsidiary of State Title Insurance Co., a wholly-owned subsidiary of Reliance Insurance Co. Reliance is owned by Reliance Financial Services Corp., a subsidiary of Reliance Group, Inc., which is owned by Reliance Group Holdings, Inc.

Chicago Title Insurance Co. is a wholly-owned subsidiary of Chicago Title & Trust Co., which is a wholly-owned subsidiary of Allegheny Corp.

Continental Title Insurance Co. is a subsidiary of Industrial Valley Title Insurance Co.

Industrial Valley Title Insurance Co. is a wholly-owned subsidiary of IVT Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Commonwealth Land Title Insurance Company, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on February 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted in the Appendix hereto, at p. 1a *infra*. The opinions of the District Court denying plaintiffs' motion to remand and dismissing plaintiffs' action on the merits have not been reported and are attached in the Appendix hereto at p. 48a and 30a, respectively.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1992. Petitioners' timely Petition for Rehearing was denied by Order of the Court dated April 2, 1991.

This Court has jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 6045:

(a) General rule.--Every person doing business as a broker shall, when required by the Secretary, make a return, in accordance with such regulations as the Secretary may prescribe, showing the name and address of each customer, with such details regarding gross proceeds and such other information as the Secretary may by forms or regulations require with respect to such business.

(b) Statements to be furnished to customers.--Every person required to make a return under subsection (a) shall furnish to each customer whose name is required to be set forth in such return a written statement showing--

(1) the name and address of the person required to make such return, and

(2) the information required to be shown on such return with respect to such customer.

The written statement required under the preceding sentence shall be furnished to the customer on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

(c) Definitions.--For purposes of this section--

(1) Broker.--The term "broker" includes--

(A) a dealer,

(B) a barter exchange, and

(C) any other person who (for a consideration) regularly acts as a middleman with respect to property or services.

• • •

(e) Return required in the case of real estate transaction.--

(1) In general.--In the case of a real estate transaction, the real estate reporting person shall file a return under subsection (a) and a statement under subsection (b) with respect to such transaction.

(2) Real estate reporting person.--For purposes of this subsection, the term "real estate reporting person" means any of the following persons involved in a real estate transaction in the following order:

(A) the person (including any attorney or title company) responsible for closing the transaction,

(B) the mortgage lender,

(C) the seller's broker,

(D) the buyer's broker, or

(E) such other person designated in regulations prescribed by the Secretary.

Any person treated as a real estate reporting person under the preceding sentence shall be treated as a broker for purposes of subsection (c)(1).

(3) Prohibition of separate charge for filing return.--It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

• • •

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a) and (b):

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

Plaintiffs in these actions[1] brought suit in the Court of Common Pleas of Philadelphia County, Pennsylvania alleging that they and a purported class of similarly situated persons had been injured as a result of defendants' violations of a federal tax statute, 26 U.S.C. § 6045(e)(3). Defendants (petitioners herein) removed the actions, averring in their removal petitions that plaintiffs' causes of action were premised upon allegations that defendants had violated a federal statute, and therefore original and removal federal jurisdiction existed pursuant to 28 U.S.C. §§ 1331 and 1441. Plaintiffs' motion to remand was denied (75a), and subsequently the District Court granted defendants' motion to dismiss on the ground that the practices alleged did not violate the statute. (29a, 47a). Upon plaintiffs' appeal, the Third Circuit reversed, finding that the federal court lacked jurisdiction over the action because it was brought as an action under state law and Congress had not provided for a private enforcement action for the federal statute involved, relying upon *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). Judge Cowen dissented.

Section 6045 of the Internal Revenue Code imposes reporting requirements on brokers generally. Section 6045(e) extends the reporting requirements to "real estate transactions and real estate reporting persons", which includes defendants pursuant to § 6045(e)(2)(A). Petitioners, who are title insurance companies and settlement agents frequently responsible for closing real estate transactions, are required to

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[1] The four separate actions were consolidated for pretrial purposes in the District Court and in the Court of Appeals.

file a return with the Internal Revenue Service disclosing the name, address and gross proceeds received by each seller and to furnish a written statement to the seller of the information provided to the government (the I.R.S. "Form 1099"). 26 U.S.C. §§ 6045(a) and (b).

Section 6045(e)(3) of the Code was added by Congress as of November 10, 1988 in Section 1015 of the Technical and Miscellaneous Revenue Act of 1988. That section, upon which plaintiffs relied as the basis of each of their claims, provides:

> **Prohibition of separate charge for filing return.**--It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

26 U.S.C. § 6045(e)(3).

Plaintiffs were parties to real estate transactions that occurred after the effective date of the Act in which defendants were title insurers and/or settlement agents. The complaints allege that defendants violated § 6045(e)(3) by charging a fee for performing the reporting acts required by § 6045. (53a) Plaintiffs asserted state common-law claims for conversion, unjust enrichment, and money had and received, as well as a statutory claim under the Pennsylvania Unfair Trade Practice and Consumer Protection Law (UTPCPL), 73 Pa.C.S.A. § 201-1 *et seq.*; but each of these theories of recovery was premised on the claim that the fees were prohibited by the Internal Revenue Code.

Following the defendants' removal of the actions and plaintiffs' motions to remand, the District Court entered an Order and Memorandum of Decision on August 2, 1990, finding after a lengthy analysis that federal jurisdiction was present. The court first found that "an essential element of each of [plaintiffs'] state-law causes of action is a showing of wrongful, illegal conduct." (53a) In order for plaintiffs to recover on any of these claims, plaintiffs would thus have to prove that defendants violated § 6045. (71a)

The District Court then reviewed the historical progression of this Court's federal question jurisprudence, analyzing the doctrine as it developed in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), *Gully v. First National Bank*, 299 U.S. 109 (1936), *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). Although it recognized the importance that this Court in *Merrell Dow* had placed upon the failure of Congress to provide a private federal remedy for violation of a federal statue incorporated as an element in a state-law claim in finding federal jurisdiction lacking, the District Court concluded that the Court had *not* "set forth a bright-line rule" that federal question jurisdiction could never be found in such cases. (65a) Instead, it found that the *Smith-Gully-Franchise Tax Board* "arising under" analysis was also still viable, and federal question jurisdiction could be found where the plaintiffs' right to relief necessarily depended upon the resolution of a substantial, disputed question of federal law. (66a-67a)

The District Court then made the assumption, as had the parties, that the Internal Revenue Code did not provide

a private remedy for violations of Subsection 6045(e)(3). (70a) It concluded that it nevertheless had federal question jurisdiction over the present actions because (1) the federal law was not "merely present" in the state-law causes of action, but was a necessary element of each claim, on which plaintiffs' right to relief depended; (2) the meaning of Subsection 6045(e)(3) was in dispute, which dispute "is the core of these actions";[2] (3) The dispute was substantial in nature, since Sec. 6045 "is invested with a weighty federal interest;" the extent of allowable charges for filing information returns and providing 1099 forms having a direct impact on the federal interest in ensuring accurate, regular filings of reporting documents. (71a-72a) Thus, the court concluded that because a substantial question concerning Section 6045 "is a necessary element of the plaintiffs' well-pleaded state-law claims and is in dispute between the parties," the exercise of federal-question jurisdiction was appropriate. (73a)

The District Court, following defendants' Motion to Dismiss pursuant to Rule 12(b)(6), briefing and oral argument, then agreed with defendants' view of the requirements of § 6045(e)(3) and dismissed plaintiffs' actions on the ground that defendants had not "separately" charged for their reporting functions and had not violated the statute.[3]

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[2] Plaintiffs contended that *any* fee for filing and supplying information returns was disallowed under the statute, while defendants argued that charges attributable to their time and expense in preparing the forms were lawful so long as they were merged into the overall price--*i.e.* not "separately" charged.

[3] The court disagreed with defendants' additional argument that plaintiffs' actions were impliedly pre-empted by the administrative enforcement scheme of the Internal Revenue

(42a-47a) Plaintiffs appealed the dismissal of their actions to the Court of Appeals for the Third Circuit, where they reasserted their argument that federal-question jurisdiction was lacking over their state-law based complaints. A divided panel of the Court of Appeals reversed and ordered the case remanded to state court.[4] (26a) The majority concluded that this Court's holding in *Merrell Dow*, *supra*, left "no room to conclude that the District Court had federal question jurisdiction over plaintiffs' removed state law causes of action." (10a) Although the Court of Appeals agreed with the District Court that each state law claim necessarily required proof of a wrongful act by defendants, and this element could only be supplied by the alleged violation of the federal statute (6a-7a), it nevertheless concluded that, under *Merrell Dow*, " a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction in this circumstance." (11a)

The Court of Appeals acknowledged that the likely consequence of its decision was to shift to a Pennsylvania Court the responsibility of interpreting § 6045(e)(3) of the Internal Revenue Code. But it found this result proper under *Merrell Dow*, and opined that whatever interpretation the state courts might give this provision of the Code, "it will have no effect whatsoever on the collection of tax by the United States." (12a-13a)

Code. (36a-42a)

[4] By order of April 22, 1992, the court stayed the issuance of its mandate until May 11, 1992, pending the filing of this Petition for Certiorari.

Judge Cowen, in a dissenting opinion, argued that the majority had unjustifiably relied on *Merrell Dow* to the exclusion of the "long line of cases which along with *Merrell Dow* define federal jurisdiction." (14a) According to the dissent, *Smith v. Kansas City Title & Trust Co.*, *supra*, and *Franchise Tax Board*, *supra*, authorize a still-viable basis for federal-question jurisdiction: when "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." (14a) Judge Cowen noted that *Merrell Dow* had not overruled *Smith* and *Franchise Tax Board*, but had cited them with approval. The only way to reconcile the three cases, he concluded, "is to hold that federal jurisdiction can exist in the absence of a private federal remedy when a substantial federal question is involved." (16a) Judge Cowen found the construction of § 6045(e)(3) to be a substantial question of federal law and accordingly concluded that *Smith* and *Franchise Tax Board* controlled this case and federal jurisdiction existed. (14a)

Judge Cowen took issue with the majority's adoption of a rigid rule that a private federal remedy is a prerequisite for finding federal question jurisdiction for violation of a federal statute. Such a rule, he argued, leaves no room for the consideration of other federal interests, of the broader issues of Congressional intent, judicial authority, and the division of powers in a federal system, which the Court in *Merrell Dow* had included in the necessary evaluation of the *nature* of the federal interest at stake. (18a-20a) Judge Cowen stressed the significance of the federal issue in this case: the administration of the Internal Revenue Code. He disagreed with the majority's benign view of potentially differing state court interpretations of this Code provision. The federal reporting requirement is essential to the collection of taxes; any

provision that affects the reporting of proceeds from home sales, as this one does, could affect tax collection. Therefore, fifty different state court interpretations of 26 U.S.C. § 6045, and the resulting confusion, could well have an impact on the collection of taxes. (20a-21a)

Defendants' Petition for Rehearing was denied by the Court of Appeals on April 2, 1992. Judge Cowen noted his dissent from denial of rehearing. (78a)

REASONS FOR GRANTING THE WRIT

A. THE THIRD CIRCUIT'S RULING MISAPPLIES *MERRELL DOW PHARMACEUTICALS, INC. V. THOMPSON*, 478 U.S. 804 (1986) AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS

1. The Holding of the Court Below Incorrectly Applies *Merrell Dow* as an Inflexible Test for Federal Jurisdiction, in Conflict with Prior Decisions of this Court

The majority decision of the Third Circuit panel concluded that under *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), a private federal remedy for violation of a federal statute is always a "prerequisite" for finding federal question jurisdiction over a state law claim incorporating federal law even where, as in this case, the state law claims will necessarily be determined by interpretation of the federal law. Consequently, the Court of Appeals determined that federal question jurisdiction did not exist over

this action which is expressly based upon an alleged violation of a federal tax statute. That result is inconsistent with this Court's decision in *Merrell Dow* and contradicts the holding of *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Moreover, it conflicts with *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), whose alternative basis for federal question jurisdiction in cases such as the present one was reaffirmed in *Merrell Dow* and in decisions of this Court after *Merrell Dow*.

This Court's decision in *Merrell Dow*, while emphasizing that the "vast majority" of cases brought under the general federal-question jurisdiction of the federal courts contain a federal law-created cause of action, also reaffirmed the basis for such jurisdiction recognized in *Franchise Tax Board*: "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow*, 478 U.S. at 808, *quoting Franchise Tax Board*, 463 U.S. at 9. In *Merrell Dow*, the federal law[5] was present only as an element in one of plaintiffs' six causes of action, and in that claim it merely supplied one available criterion for determining negligence. 478 U.S. at 807. This Court determined that, in the absence of a Congressional provision of a federal remedy for violation of this statute, the mere presence of a claimed violation of the statute as an element of a state cause of action would be insufficiently "substantial" to confer federal-question jurisdiction. *Id.* at 814.

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[5] The Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*, which prescribes requirements for adequate labeling and warnings for drugs sold in interstate commerce.

The Court reached this conclusion after emphasizing that *Franchise Tax Board* had not created "some kind of automatic test," but had "recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction." *Id.* Thus, the *Franchise Tax Board* "substantial disputed question of federal law" test must be applied with caution and with attention to the "*nature* of the federal interest at stake." 478 U.S. at 814 n.12. But the Court did not eliminate that test as an alternative, albeit limited, basis for federal-question jurisdiction. It cited *Smith v. Kansas City* as an example of the application of that test. 478 U.S. at 809 n.5. In *Smith*, a shareholders' suit to enjoin the purchase of bonds by the corporation was styled as a state-law cause of action but depended for its success on the resolution of the question whether the federal law authorizing issuance of the bonds was constitutional. The Court found federal-question jurisdiction present because the plaintiffs' right to relief depended upon the constitutional validity of an act of Congress which was "directly drawn in question." 255 U.S. at 201.

Merrell Dow did not overrule *Smith*, and therefore the basis for federal-question jurisdiction found in *Smith* is still viable so long as the federal issue is necessary to the resolution of the state law claim and is substantial in nature. As Justice Brennan noted, "[T]he continuing vitality of *Smith* is beyond challenge." 478 U.S. at 820 (dissenting opinion). Not only was the *Smith* basis for federal-question jurisdiction reaffirmed in *Franchise Tax Board*, it has been cited with approval by citations to the *Franchise Tax Board* formulation in decisions of this Court rendered after *Merrell Dow*. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-94 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (citing *Franchise*

Tax Board with approval). And in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), the Court applied the express language of *Franchise Tax Board* to its analysis of federal jurisdiction under 28 U.S.C. § 1338(a), which employs the identical "arising under" standard as § 1331:

> Linguistic consistency, to which we have historically adhered, demands that § 1338(a) jurisdiction likewise extend only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

486 U.S. at 808-809.

Therefore, since the basis of federal-question jurisdiction found in *Smith* is still viable following *Merrell Dow*, *Merrell Dow* cannot properly be interpreted as establishing a bright-line test looking *only* to the presence or absence of a federal cause of action. The Court, to the contrary, required the lower federal courts to exercise judgment and determine when a federal question is "substantial" and "necessary", as opposed to "merely present", in a state cause of action. Under any such formulation, federal-question jurisdiction would be found in this case, since plaintiffs' state law causes of action are not actionable unless a court finds a violation of 26 U.S.C. § 6045(e)(3) -- the meaning of which is disputed. The Third Circuit's ruling that

Merrell Dow bars such a finding by means of an across-the-board "prerequisite" of a federal cause of action misapplies *Merrell Dow* and contradicts *Smith* and *Franchise Tax Board*.

2. The Third Circuit's Decision That *Merrell Dow* Makes a Federal Cause of Action a Prerequisite to Federal-Question Jurisdiction Whenever the Federal Claim is Part of a State Cause of Action Conflicts With the Decisions of Other Circuits Since *Merrell Dow*

In the six years since *Merrell Dow* was decided, the Courts of Appeals have failed to reach a consensus about what it means. The Second and Sixth Circuits have squarely held that federal jurisdiction may be found when a plaintiff's state claim necessarily depends upon a federal law, even in the absence of a federal right of action. The Fifth Circuit, while its decisions turn on other grounds, appears to agree in principle with this view. The Seventh Circuit has held, as did the Third Circuit in this case, that even if the federal question may be substantial and necessary to the plaintiff's case, the absence of a Congressionally authorized federal right of action ends the inquiry and no federal-question jurisdiction exists. The Fourth Circuit may agree with this view, although the case it decided arguably did not present a substantial and necessary federal issue. The First and District of Columbia Circuits also appear to be in this camp. The Ninth Circuit at first adopted the restrictive interpretation of *Merrell Dow*, but more recently appeared to agree in principle with the broader view. Clearly the widespread confusion among the Courts of Appeals in this important area of the law calls for the intervention of this Court.

The Sixth Circuit, whose ruling this Court affirmed in *Merrell Dow*, construed that decision, in *Milan Express Co., Inc. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989), to allow federal-question jurisdiction where plaintiffs' claims to proceeds of surety bonds prescribed under federal statutes and regulations depended necessarily on a substantial question of federal law and the historically federal interest in the regulation of interstate commerce was involved.[6] The dissent argued that because plaintiffs sought to enforce their rights to the bond proceeds under state law, and there was no federal right of action on the bonds, *Merrell Dow* barred a finding of jurisdiction. 886 F.2d at 789.

The Second Circuit also views Merrell Dow as reaffirming the "two tests" for federal-question jurisdiction represented by *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (whether federal law creates the cause of action) and *Smith v. Kansas City*, *supra* (if state law creates the cause of action, whether the case poses a substantial federal question). In *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192-93 (2d Cir.) *cert.*

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[6] The Sixth Circuit reaffirmed its view that the alternative basis for federal-question jurisdiction advanced in *Franchise Tax Board* is still viable, in *Thornton v. Southwest Detroit Hospital*, 895 F.2d 1131 (6th Cir. 1990). The court found that plaintiff's claim based on the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, met "each of the alternative prongs of the *Franchise Tax* test." *Id.* at 1133. First, plaintiff's action depended on a resolution of issues involving the meaning of the Act; and second, the Act provided for a federal cause of action. *Id.*

denied, 484 U.S. 850 (1987)[7], the Second Circuit held alternatively that federal question jurisdiction was present under either test, in a suit to enjoin termination of developer-made contracts under the Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. §3601 *et seq*. Even if the Act did not authorize a federal cause of action, which the court found that it did, plaintiffs' state-law claims, in the nature of an action to remove a cloud on title, depended on an interpretation of § 3607 of the Act to determine if the "cloud" existed. 815 F.2d at 195. Therefore, plaintiffs' claims encompassed a substantial federal question under the Act, which also established "arising under" jurisdiction. *Id.* at 193.[8]

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[7] The court read *Merrell Dow* as holding that "when Congress has provided no private right of action under a federal statute, the borrowing of that federal law as a standard of conduct in a state created action is not sufficiently substantial to confer federal question jurisdiction". 815 F.2d at 193.

[8] An earlier decision of the Second Circuit, *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. dis.*, 480 U.S. 942 (1987), also found a substantiality issue left to the federal courts in determining jurisdiction under *Merrell Dow*. In that case the Philippines brought suit in New York pursuant to an Executive Order of President Aquino to obtain possession of real property in New York allegedly obtained by former President Marcos. The Second Circuit noted that the action was akin to a state cause of action for conversion, but found that the claim would have a direct and significant effect on American foreign relations and therefore *Merrell Dow* allowed it to find federal question jurisdiction. 806 F.2d at 352-54. Under the Third Circuit's application of *Merrell Dow*, the court would not be permitted to make that determination since no federal cause of action is involved.

The Fifth Circuit, in *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), *aff'd. on other grounds*, 111 S.Ct. 2824 (1991), gave a somewhat confusing statement of its position on "arising under" jurisdiction after *Merrell Dow*. It first recognized the alternative analyses of *Franchise Tax Board*, noting its interpretation of the "substantial question" test as a "narrow exception" to the rule that a suit "arises under the law that creates the cause of action." 855 F.2d at 1168. Then it observed that *Merrell Dow* made a private federal remedy a "necessary predicate" and a "minimum requirement" for finding federal-question jurisdiction in a state cause of action. *Id.* at 1168-69. Ultimately the court concluded that the plaintiff's federal law theory was not necessary to his claim since an alternative state law theory was sufficient; therefore it remanded the case to state court pursuant to *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). In *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540 (5th Cir. 1990), the Fifth Circuit again appeared to agree in principle with the *Franchise Tax Board* and *Smith* formulations of federal jurisdiction, and read *Merrell Dow* as rejecting any "one formulation" of "arising under" jurisdiction. 891 F.2d at 542. But it decided the case on the ground that Kidd's employment claim did not depend substantially on interpretation of a collective bargaining agreement, so federal concerns were not directly implicated.[9] Thus the Fifth Circuit seems to conflict in principle with the Third Circuit's decision, albeit not so starkly as the Second and Sixth Circuit holdings.

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[9] The court found that plaintiff's subsequent amendment of her complaint to add an ERISA claim did however provide a basis for federal-question jurisdiction. 891 F.2d at 547.

The Ninth Circuit may have moved away from a restrictive interpretation of *Merrell Dow* to one that allows some latitude in the federal court's determination of jurisdiction, in *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412 (9th Cir. 1990). Though the court ultimately concluded that it did not have federal-question jurisdiction over an action for indemnity that depended upon construction of both state and federal environmental law, it indicated that it would have found jurisdiction if Ultramar's right to relief *necessarily* depended on construction of a substantial question of *federal* environmental law alone. 900 F.2d at 1414. This statement contrasts with the Ninth Circuit's earlier decisions in *Utley v. Varian Associates, Inc.*, 811 F.2d 1279 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987) and *Millers National Insurance Co. v. Axel's Express, Inc.*, 851 F.2d 267 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). In *Utley* the court held that it did not have removal jurisdiction over a state cause of action for termination of employment that depended upon an issue of the employer's compliance with a federal affirmative action program because Utley had no private right of action under the executive order establishing the federal program, and therefore his claim could not raise a substantial federal question under *Merrell Dow*. 811 F.2d at 1286. The court applied the same bright-line test in *Millers National Insurance*, *supra*, when it rejected an indemnification case between insurers for interstate carriers although the question of liability between the insureds would be determined by the federal law governing interstate commerce. The court ended its analysis when it determined that the federal law did not provide a private right of action "to insurers of carriers for indemnification against

insurers of equipment owners." 851 F.2d at 270.[10] In light of the *Ultramar* reasoning, however, the Ninth Circuit's continued adherence to this rigid view of the *Merrell Dow* test for federal-question jurisdiction is at least in doubt.

The Seventh Circuit has adopted the same "unreserved application" of *Merrell Dow* that the Sixth Circuit criticized and the Third Circuit employed in this case. In *Dillon v. Combs*, 895 F.2d 1175 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 670 (1991), the Seventh Circuit rejected federal-question jurisdiction over a complaint by the state of Indiana against a medical liability insurance purchasing group based on alleged violations of the Product Liability Risk Retention Act of 1981, 15 U.S.C. § 3903. The court stated:

> A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule.

895 F.2d at 1177 (citing *Merrell Dow*). Upon its conclusion that § 3903(f) of the Act had no private federal right of enforcement, the court ordered the complaint dismissed for want of jurisdiction. 895 F.2d at 1177-78.

The Fourth Circuit also found *Merrell Dow* to bar federal jurisdiction in a case in which plaintiffs argued that the violation of federal Hazardous Materials Regulations established negligence *per se* in their single claim against

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[10] The Sixth Circuit expressly disagreed with this result in *Milan Express Co., Inc. v. Western Surety Co.*, *supra*, and questioned "the wisdom of the Ninth Circuit's unreserved application of *Merrell Dow*." 886 F.2d at 788 n.2.

defendant and thus raised a substantial federal question. *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196 (4th Cir. 1991). The court found the case "not distinguishable from *Merrell Dow*" and affirmed the dismissal of the District Court because there was no private federal action provided under the Regulations. 944 F.2d 198. The case may represent an appropriate application of *Merrell Dow* in that the federal statute was only an element in the plaintiffs' state negligence action. The Fourth Circuit distinguished *Milan Express* and *West 14th St.* because there the plaintiffs' rights were actually created by federal law. 944 F.2d at 198-99. Thus while the Fourth Circuit may belong at this point in the camp of the Third and Seventh Circuits, that court has not yet been presented with a case in which the federal law is necessary to and decisive of the state law action.[11]

Because of the direct and irreconcilable conflict between the decisions of the Third and Seventh Circuits on the

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[11] The First Circuit likewise applied *Merrell Dow* in a terse decision finding no jurisdiction over a claim that, like *Merrell Dow*, alleged a violation of the FDCA as evidence of negligence. *Rodriguez v. SK&F Co.*, 833 F.2d 8 (1st Cir. 1987). And the D.C. Circuit appeared to follow the rigid application of *Merrell Dow* when it noted in *Rogers v. Platt*, 814 F.2d 683 (D.C. Cir. 1987) that a determination of no federal cause of action under the Parental Kidnapping Prevention Act automatically meant no federal jurisdiction in a custody action alleging violations of the Act. Id. at 688-89. The court also noted, however, that "It is by no means clear how far *Merrell Dow* cuts back on the well-pleaded state claim doctrine." *Id.* at n.4. Thus there is also insufficient evidence at this point on which to place these courts on one or another side of the *Merrell Dow* division.

one hand, and the Sixth and Second Circuits on the other hand, with decisions of other Circuits conflicting at least in principle, petitioners request that this Court issue a Writ of Certiorari to resolve the conflict and confusion among the Courts of Appeals on the proper application of *Merrell Dow* in determining the presence or absence of federal-question jurisdiction in a claim based on state law.

B. THE QUESTION OF WHETHER *MERRELL DOW* ANNOUNCED AN ABSOLUTE RULE BARRING FEDERAL JURISDICTION IN THE ABSENCE OF A FEDERAL RIGHT OF ACTION IS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

From the widespread disagreement among the Courts of Appeals on the proper application of *Merrell Dow* and the continued viability of *Smith* and *Franchise Tax Board*, it can be seen that guidance from this Court is required. The question involved is one of great significance to the federal judicial system and its relationship to the state courts. The broad impact is well illustrated by the variety of contexts in which the Courts of Appeals have had to deal with the fundamental issues of federal-question jurisdiction. Moreover, the effect is magnified at the district court level by the fact that remand decisions under § 1441 are not reviewable "on appeal or otherwise." 28 U.S.C. § 1447(d).

Depending upon the rule for determining federal-question jurisdiction that this Court announces, federal courts may or may not be denied the opportunity to analyze and weigh the nature of the federal interest at stake in determining whether federal jurisdiction should be found in a given case

ostensibly based on state law. If the Third Circuit's approach prevails, lower federal courts will not be able to interpret significant issues of federal law if the law is not self-enforcing, even in areas such as the Internal Revenue Code where the federal interest is substantial and even if the plaintiff's case *depends* upon a particular interpretation of that law. Such a result, petitioners submit, should not be the presumed intent of Congress based only upon the failure to authorize a private right of action.[12] Nor is it the result envisioned in this Court's unanimous decision in *Franchise Tax Board* or even in *Merrell Dow*.

In the absence of clear guidance by this Court, the lower federal courts will continue to reach unpredictable and conflicting results based upon varying applications of the *Merrell Dow* analysis. Therefore, a definitive ruling by this Court is needed in this important area of federal "arising under" jurisdictional jurisprudence.

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[12] Judge Cowen, in dissent in this case, quoted one commentator on this subject:

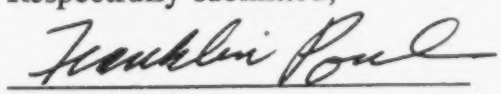
> [I]t can be questioned whether the absence of a federal cause of action means that Congress intended to foreclose federal jurisdiction when the construction of the federal law will be decisive in a state lawsuit. Congress may have thought it unnecessary to authorize suits for recovery; it does not follow that Congress decided it was unnecessary to have a federal court interpret the federal law in every instance.

Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.3 (1989) (quoted at 19a).

CONCLUSION

For the foregoing reasons, this Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,



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May 8, 1992

Filed February 24,1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.91-1555

ANNE MARIE SMITH, Individually and on
Behalf of Persons Similarly Situated,
Appellant
V.
INDUSTRIAL VALLEY TITLE INSURANCE COMPANY

No.91-1556

GARY VOLINER and CINDY VOLINER,
Husband and Wife, Individually and on
Behalf of Persons Similarly Situated,
Appellants
V.
CHICAGO TITLE INSURANCE COMPANY
PROFESSIONAL ABSTRACT AND ASSURANCE
CORP.

No.91-1557

MAY FRANKEL, Individually and on Behalf of
a Class of Persons Similarly Situated,
Appellant
V.
CONTINENTAL TITLE INSURANCE COMPANY
LEGAL ABSTRACT COMPANY

No. 91-1558

CAROLYN BURNS, as Executrix of the
Estate of Juliette L. Echols, Deceased
ATTILIO J. CHIARROCCHI, as Chiarrocchi, Deceased
MAU THI LE, Individually and on Behalf of
Persons Similarly Situated,
Appellants
V.
COMMONWEALTH LAND TITLE INSURANCE
COMPANY
NORTHWESTERN ABSTRACT COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 90-02132,90-02175, 90-02971,90-03856)

Argued January 7, 1992
Before: COWEN, NYGAARD and WEIS, Circuit Judges
(Opinion Filed: February 24, 1992)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*:

In these consolidated class actions removed to the district court from the Court of Common Pleas in Philadelphia County, the district court dismissed the action under Fed. R. Civ. P. 12(b)(6), after denying plaintiffs' motions to remand the matter to the state court. The question is whether the district court had subject matter jurisdiction. Since we conclude it did not, we will vacate its dismissal order and remand the cause to the district court for it to further remand these consolidated class actions to the state court.

I.

Plaintiffs are home sellers who asserted state statutory and common law claims against several title insurance companies who provided services in connection with plaintiffs' home sales. Defendant title insurance companies are "real estate reporting person[s]" as defined in section 6045(e) (2) of the Internal Revenue Code, 26 U.S.C. § 6045. Section 6045 imposes transactional reporting requirements on brokers generally. Section 6045(e)(1) extends these general reporting requirements to real estate transactions and "real estate reporting person[s]" within the meaning of the statute. Since a title company providing services in a residential real estate settlement is a "real estate reporting person" within the meaning of the statute, *see* 26 U.S.C. § 6045(e)(2)(A), the title company defendants were obligated to comply with § 6045's information reporting requirements when participating in plaintiffs' home sales. *See* 26 U.S.C. § 6045(a),(b),(e)(1),(e)(4).

Plaintiffs brought suit in the Pennsylvania court on behalf of themselves and others "who generally can be described as all persons who bought or sold residential real estate and were charged an IRS reporting fee by defendants since November 10, 1988." In essence, the gravamen of plaintiffs' claims is that defendants "separately charg[ed]" the homeowners for the information reporting required by § 6045(e)(1), in violation of § 6045(e)(3).

Section 6045(e)(3), which is fundamentally at issue in each of plaintiffs' claims, provides (emphasis added):

> It shall be unlawful for any real estate reporting person to *separately charge* any customer for complying with any requirement of [§ 6045(e)(1)].

Since the parties dispute the meaning of § 6045(e)(3)'s prohibition against "separate charge[s]", each plaintiff claim requires judicial construction of a federal provision - and a determination of whether the title insurance companies' alleged conduct falls within the statutory prohibition.

Plaintiffs did not assert federal causes of action, but sought recovery of damages on state common law theories of conversion, unjust enrichment, and for money had and received, and for unfair or deceptive acts or practices within the meaning of Pennsylvania's Unfair Trade Practice and Consumer Protection Law, 73 P.S. § 201 *et seq*. As the district court correctly observed, an essential element of each state cause of action is that defendants violated § 6045(e)(3) of the Internal Revenue Code: each state law theory of recovery necessarily required proof of an unlawful or wrongful act by defendants, and this element was supplied by plaintiffs' allegations that defendants violated the federal statute.

Given the presence of this federal issue within plaintiffs' state law claims, defendants removed the class actions from the state court to district court. Defendants asserted in their Notices of Removal that each of plaintiffs' claims "arise under" federal law within the meaning of 28

U.S.C. §§ 1331 and 1441[1] because each state law claim is premised upon alleged violations of the federal statute.

Following removal, plaintiffs moved under 28 U.S.C. § 1447 to remand the cases back to the state court.[2] Plaintiffs argued the district court lacked federal subject matter jurisdiction because the Internal Revenue Code does not provide a private federal remedy for a violation of § 6045(e)(3), and plaintiffs' claims are state causes of action.

The district court denied plaintiffs' remand motions, concluding that plaintiffs' claims "arise under"

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[1] Section 1441(b) provides in pertinent part: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C § 1441(b).

Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[2] Section 1447(c) provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). *If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded.*

28 U.S.C. § 1447(c) (emphasis added).

federal law within the meaning of 28 U.S.C. § 1331. The district court reasoned that a violation of § 6045(e)(3) was a necessary element of each of plaintiffs' claims, the parties disputed the meaning of the statute, and there existed a "weighty federal interest" in that dispute. The district court said its jurisdictional decision was supported by the "*Smith-Gully-Franchise Tax Board*" line of cases, and was not undercut by the outcome in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 , 41 S.Ct. 243, 65 L.Ed. 577 (1921); *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

Alter refusing to grant plaintiffs' motions to remand, the district court granted defendants' joint Rule 12(b)(6) motion to dismiss.

II.

Although the district court's dismissal order raises several questions concerning interpretation of § 6045 of the Internal Revenue Code, we cannot reach the merits. We must first be satisfied of both our own and the district court's jurisdiction. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934). On this point we agree with plaintiffs that, in light of *Merrell Dow*, the district court lacked subject matter jurisdiction because plaintiffs' claims do not "arise under" federal law.

In *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318, the Supreme Court held that absent diversity of citizenship, federal question jurisdiction is required and "[o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." 107 S.Ct. at 2429 (citations omitted). Since diversity of citizenship is not alleged here, the propriety of the removal turns, as it did in *Merrell Dow*, on whether plaintiffs' claims fall "within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow*, 106 S.Ct. at 3232.

While the Supreme Court has said "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law'", the Court has indicated that statement "must be read with caution." *Merrell Dow*, 106 S.Ct. at 3232 (quoting *Franchise Tax Board*, 103 S.Ct. at 2846). Thus, the "vast majority" of cases for which original federal question jurisdiction exists "are those in which federal law creates the cause of action." *Merrell Dow*, 106 S.Ct. at

3232. "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction." *Id.* at 3234.

Merrell Dow posed and answered the following question:

> The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331.

106 S.Ct. at 3230. *Merrell Dow's* answer to that question leaves no room to conclude that the district court had federal question jurisdiction over plaintiffs' removed state law causes of action.

The parties agree with the district court, and we assume without deciding, that Congress has not provided a federal private cause of action for violating 26 U.S.C. § 6045(e)(3).[3] With that assumption, *Merrell Dow's* holding decides our jurisdictional inquiry:

> a complaint alleging a violation of a federal statute as an element of a state cause of

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[3] The Court in *Merrell Dow* was confronted with a similar situation and made the equivalent assumption. See 106 S.Ct at 3233.

> action, *when Congress has determined that there should be no private, federal cause of action for the violation*, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

106 S.Ct. at 3237 (emphasis added).

Following *Merrell Dow*, we hold that a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction in this circumstance. The district court did not have subject matter jurisdiction over plaintiffs' removed claims because they are not federal causes of action, and the only issue of federal law presented is whether there have been violations of a federal statute for which Congress did not provide a private federal remedy. "A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule." *Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990) (citing *Merrell Dow*), *cert. denied*, _ U.S. ___ 111 S.Ct. 670 (1991).

Once a federal court concludes Congress has decided not to provide a federal remedy for the violation of a particular federal statute, the court is "not free to 'supplement' that decision in a way that makes it 'meaningless.'" *Merrell Dow*, 106 S.Ct. at 3234 n. 10. When Congress has determined there should be no private, federal remedy for violation of a federal statute, that "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute...is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow*, 106 S.Ct. at 3235. The significance of such a

congressional determination "cannot be overstated" and, in the face of it, a federal court "would...flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute ...." *Merrell Dow*, 106 S.Ct. at 3234. Thus, a federal court is prohibited from finding federal question jurisdiction on the ground that such federal violation is a disputed and necessary element of a state cause of action.

Although a Pennsylvania court must, in all likelihood, interpret § 6405(e) (3) of the Internal Revenue Code to decide the merits of these home-sellers claims, a district court cannot where Congress has determined that no private remedy is available to them for defendant's violations of the statute. That determination precludes removal here.

Furthermore, that a Pennsylvania court will probably interpret the Internal Revenue Code when reaching the merits of plaintiffs' claims is proper. *Merrell Dow* recognized the possibility when the Court said, "even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action." *Merrell Dow*, 106 S.Ct. at 3236. See 28 U.S.C. § 1257. Since Congress has not provided a private federal remedy for violating § 6045(e) (3), *Merrell Dow* dictates that the district court did not have subject matter jurisdiction:

> Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is

> not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system.

Merrell Dow, 106 S.Ct. at 3235.

Moreover, in this case, no matter what interpretation the Pennsylvania courts might give this particular provision of the Internal Revenue Code, it will have no effect whatsoever on the collection of tax by the United States. No federal precedent will be set by state courts in this circumstance, so even inconsistent interpretations of this provision among the states will not affect federal jurisprudence in any way. It is simply that Pennsylvania plaintiffs have pleaded a state-law cause of action for violating a provision of federal law for which there is otherwise no private right of action.

III.

In conclusion, we will vacate the district court's dismissal of plaintiffs' claims because the district court lacked subject matter jurisdiction. We remand to the district court for it to remand these consolidated class actions to the state court.

COWEN, *Circuit Judge*, dissenting.

This case clearly turns on a substantial question of federal law. Because I cannot agree with the majority's interpretation of the Supreme Court precedents pertaining to federal question jurisdiction. I respectfully dissent.

I.

The majority places great emphasis on the Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), but in doing so neglects the long line of cases which along with *Merrell Dow* define federal jurisdiction. *In Smith v. Kansas City Title & Title Co.*, 255 U.S. 180 (1921), the Court held that federal question jurisdiction exists when the plaintiff's "right to relief depends upon the *construction* or *application* of the Constitution or the laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation." *Id.* at 199 (emphasis added). More recently, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), a unanimous Court held that the federal courts have original or removal jurisdiction when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a *substantial question of federal law.*" *Id.* at 27-28 (emphasis added). How the federal reporting fee statute, 26 U.S.C. § 6045(e)(3) (1988), is construed is clearly a substantial question of federal law. I believe *Smith* and *Franchise Tax Board*, not *Merrell Dow*, control this case.

In *Merrell Dow*, one count of the plaintiff's six-count complaint alleged that the drug Bendectin had been misbranded in violation of the Federal Food, Drug, and Cosmetic Act (FDCA). The other five counts alleged state law claims of negligence, strict liability, breach of warranty, fraud, and gross negligence. The Supreme Court held in a 5-4 decision that this single federal claim was not enough to confer federal jurisdiction:

> We conclude that a complaint alleging a violation of a federal statute *as an element* of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow, 478 U.S. at 817 (quoting 28 U.S.C. § 1331) (emphasis added).

In *Merrell Dow*, the violation of the FDCA was only one factor which could have been considered in determining negligence, thus the jury could have found the defendant negligent under state law without also finding a violation of the FDCA. *Id.* at 807. Consequently, the state law claims could have proceeded with the same force without the federal claim. The difference between *Merrell Dow* and the case presently before us is that here the state law claims cannot be decided without also deciding the federal claim. Section 6045(e)(3) is more than just an "element" of the state law claims. The federal statute forms the fundamental foundation of the state law claims. Indeed, if the defendant title insurance companies are found not to have violated the federal reporting fee statute, no state law claims will lie against them. The state law claims of conversion, money had and received, unjust enrichment, and unfair and deceptive trade practices are nothing more than remedies for the violation of section 6045(e)(3).

Moreover, *Merrell Dow* did not overrule the Supreme Court's earlier decisions in *Smith* and *Franchise*

Tax Board - both of which established more expansive standards for federal jurisdiction. In fact, the Supreme Court cited both cases with approval in *Merrell Dow*. *Id.* at 809 n.5, 813-14.[1] Although *Merrell Dow* did not reconcile its holding with the Court's previous decisions, it recognized the existence of two different types of cases. *Id.* at 814 n. 12. The first type, which includes *Smith*, involves the construction, application or constitutionality of a federal statute, and federal jurisdiction exists in such cases. The second type involves "the violation of the federal standard as an element of state tort recovery [which does] not fundamentally change the state tort nature of the action," *id.* (citing *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934)), and federal jurisdiction does not exist in such cases. The case before this court is more like the first type than the second, since it involves the construction of a federal statute which comprises *more* than just an "element" of a state claim. The only way to reconcile *Merrell Dow* with *Smith* and *Franchise Tax Board* is to hold that federal jurisdiction can exist in the absence of a private federal remedy when a substantial federal question is involved.

The majority's almost exclusive reliance on *Merrell Dow* inappropriately portends the death of *Franchise Tax Board*, reports of which have been greatly exaggerated. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), decided just one year after *Merrell Dow*, the Court held that

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[1] As Justice Brennan noted in his *Merrell Dow* dissent: "The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times - most recently just three Terms ago by a unanimous Court in *Franchise Tax Board*." 478 U.S. at 820.

"[t]he century-old jurisdictional framework governing removal of federal question cases from state into federal courts is described in Justice Brennan's opinion for a unanimous Court in *Franchise Tax Board.*" *Id.* at 63. Nowhere was the doctrine of *Merrell Dow* cited.

In *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166 (1988), the Court applied the express language of *Franchise Tax Board* to patent cases under 28 U.S.C. § 1338. Following a general discussion of federal question jurisdiction under section 1331, the Court held that

> [section] 1338 jurisdiction likewise extend[s] only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a *substantial question* of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Id. at 2173 (emphasis added). See also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-94 (1987) (citing *Franchise Tax Board* with approval). Moreover, the substantial question test of *Franchise Tax Board* has been applied explicitly by at least three courts of appeals since *Merrell Dow*. See *Ultramar America, Ltd., v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990); *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir. 1990); *Milan Exp. Co., Inc. v. Western Sur. Co.*, 886 F.2d 783, 788 (6th Cir. 1989); *West 14th St. Commercial Corp., v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir.), *cert. denied*,

484 U.S. 850 (1987); *cf. Pruitt v. Carpenters' Local Union No. 225*, 893 F.2d 1216, 1218 (11th Cir. 1990) (for federal question jurisdiction, "the plaintiff's well-pleaded complaint simply may raise issues of federal law."); *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 542(5th Cir. 1990) ("A case 'arises under' federal law when the vindication of a right under state law necessarily turns upon some construction of federal law.") (citing *Franchise Tax Board*); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1394 (9th Cir. 1988) (federal question jurisdiction "where the vindication of a right under state law necessarily turned on some construction of federal law.") (citing *Franchise Tax Board*).

II.

The majority adopts a rigid rule that "a private federal remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction in this circumstance." Majority, *supra* at ___ (Majority typescript op. at 9). Notwithstanding my belief that this is a misreading of *Merrell Dow*,[2] I believe the majority gives too much weight to congressional silence about the existence of a federal cause of action and too little weight to other important federal interests which are necessarily implicated by federal question jurisdiction.

Of course, courts are required to follow the dictates of Congress when it has clearly spoken on an issue. However, congressional silence is an entirely different

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[2] Under *Merrell Dow*, the existence of a federal cause of action is only relevant when the federal statute is merely an "element" of the state cause of action. 478 U.S. at 817.

matter, and we should be wary of inferring too much from silence. "Ordinarily, 'Congress' silence is just that - silence.'" *Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166, 2177 (1989) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)). See also *Hilton v. South Carolina Public Rys. Comm'n*, 112 S.Ct. 560, 568 (1991) (O'Connor, J., dissenting) ("The suggestion that this Court can . . better divine Congress' will to change the balance of power between the Federal Government and the States by listening to congressional silence than to a clear legislative statement substitutes telepathy for statutory interpretation."). One commentator has observed that

> it can be questioned whether the absence of a federal cause of action means that Congress intended to foreclose federal jurisdiction when the construction of the federal law will be decisive in a state lawsuit. Congress may have thought it unnecessary to authorize suits for recovery; it does not follow that Congress decided it was unnecessary to have a federal court interpret the federal law in every instance.

Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.3 (1989). One could argue just as credibly that congressional silence as to a federal cause of action indicates that Congress intended to preclude *all* private remedies, whether federal or state. Thus, to imply federal jurisdiction in the absence of a private federal remedy is no more a leap of faith than to imply a private state action in the face of congressional silence. *See Merrell Dow*, 4780.5. at 831-32 (Brennan, J., dissenting).

An inflexible rule like the one adopted by the majority leaves no room for the consideration of other federal interests which are affected by federal jurisdiction. In *Merrell Dow*, the Court looked to broader issues of congressional intent, judicial authority, and the division of powers in a federal system, in determining whether federal jurisdiction was appropriate. 478 U.S. at 810, 814. *See also Franchise Tax Board*, 463 U.S. at 8 ("[T]he phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."). As one noted treatise has observed about the majority opinion in *Merrell Dow*: "Justice Stevens' opinion is replete with hints that the Court wishes to reserve a wide discretion to tailor the 'arising under' jurisdiction to the practical needs of the particular situation." *Hart and Wechsler's The Federal Courts and the Federal System* 1020 (Paul M. Bator et. al. eds., 3d ed. 1988). Indeed, in footnote 12 of the opinion, the Court discusses the importance of examining "the *nature* of the federal interest at stake." *Merrell Dow*, 478 U.S. 814 n. 12 (emphasis in original). Thus, the lack of a federal cause of action should not be dispositive of whether federal question jurisdiction exists.

In this case, we are confronted with a federal issue of great significance: the administration of the Internal Revenue Code. The administration of the federal tax code is exclusively the responsibility of Congress and the Internal Revenue Service, 26 U.S.C. § 7801-05 (1988), with the interpretation of the Code left to the federal courts. 26 U.S.C. § 7402 (1988) (federal jurisdiction for actions brought by United States to enforce internal revenue laws); 28 U.S.C. § 1340 (1988) (federal jurisdiction for civil

actions involving internal revenue). Although Congress did not expressly create a cause of action for a violation of section 6045(e)(3), nor did it preempt all state causes of actions by enacting the internal Revenue Code, I do not believe that Congress intended to leave the interpretation of the Code's provisions to state courts, even in cases alleging a state cause of action.

Moreover, I strongly disagree with the majority's statement that allowing state courts to interpret section 6045(e)(3) would "have no effect whatsoever on the collection of tax by the United States" and would not "affect federal jurisprudence in any way." Majority, *supra* at ____ (Majority typescript op at 11). The federal reporting requirement is essential to the collection of taxes since the I.R.S. relies on this information to verify income reported on tax returns. Anything that encourages or discourages the reporting of proceeds from home sales necessarily has an effect on the collection of taxes. How a customer is charged for this reporting service would have such an effect.

If state courts adopted fifty different interpretations of what title insurance companies could charge for filing required reports, I cannot say with any confidence that the resulting confusion would not ultimately have an impact on the collection of taxes. As the Court of Appeals for the Sixth Circuit noted in a case involving the interpretation of the Interstate Commerce Act:

> The historical federal interest in the regulation of interstate commerce persuades us that plaintiffs' claims for recovery under the bonds, which are clearly creatures of federal

> law, should not be subjected to the peculiarities of interpretation in fifty different state forums. Rather, plaintiffs' claims should be heard in a federal forum that possesses substantial expertise in matters of interstate commerce.

Milan Express, 886 F.2d at 787. The Sixth Circuit's reasoning would apply with equal force to the interpretation of the Internal Revenue Code.

Even if different state interpretations of section 6045(e)(3) would not overly burden title insurance companies, there is the less tangible, but no less important, interest in protecting the integrity of federal taxation policy through uniform judicial decisionmaking. In the context of the National Labor Relations Act, another statute implicating important federal interests, the Supreme Court has stated:

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . . [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Simply put, the overwhelming federal interest in the reporting of taxable income dictates a finding of federal jurisdiction in this case.

III.

For the reasons set forth above, I would find that this case was properly removed to federal court since the complaint raised a substantial question of federal law. Although I would find proper federal question jurisdiction, I would affirm the district court's dismissal of the case on the merits under Rule 12(b)(6). I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No. 91-1555

ANNE MARIE SMITH, Individually and on
Behalf of Persons Similarly Situated,
Appellant

v.

INDUSTRIAL VALLEY TITLE INSURANCE COMPANY

No. 91-1556

GARY VOLINER and CINDY VOLINER,
Husband and Wife, Individually and on
Behalf of Persons Similarly Situated,
Appellants

v.

CHICAGO TITLE INSURANCE COMPANY
PROFESSIONAL ABSTRACT AND ASSURANCE CORP.

No. 91-1557

MAY FRANKEL, Individually and on Behalf of
a Class or Persons Similarly Situated,
Appellant

v.

CONTINENTAL TITLE INSURANCE COMPANY
LEGAL ABSTRACT COMPANY

No. 91-1558

CAROLYN BURNS, as Executrix of the
Estate of Juliette L. Echols, Deceased
ATTILIO J. CHIARROCCHI, as Chiarrocchi, Deceased
MAU THI LE, Individually and on Behalf of
Persons Similarly Situated,
Appellant

v.

COMMONWEALTH LAND TITLE INSURANCE
COMPANY
NORTHWESTERN ABSTRACT COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 90-02132, 90-02175, 90-02971, 90-03856)

Present: Cowen, Nygaard and Weis, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel January 7, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that orders of the said District Court entered June 17, 1991, be, and the same are hereby vacated insofar as plaintiffs' claims were dismissed and the cause is remanded to the said District Court with direction that it remand the consolidated class action to the state court. All of the above in accordance with the opinion of this Court.

ATTEST:

Deputy Clerk

Dated: February 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE MARIE SMITH, individually and on behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
INDUSTRIAL VALLEY TITLE COMPANY	:	NO. 90-2132
GARY VOLINER and CINDY VOLINER, h/w, individually and on behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CHICAGO TITLE INSURANCE COMPANY and PROFESSIONAL ABSTRACT and ASSURANCE CORP	:	NO. 90-2175
MAY FRANKEL, individually and on behalf of a Class of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CONTINENTAL TITLE INSURANCE COMPANY and LEGAL ABSTRACT COMPANY	:	NO. 90-2971

CAROLYN BURNS, as Executrix of the Estate of JULIETTE L. ECHOLS, Deceased, et al.	:	CIVIL ACTION
v.	:	
COMMONWEALTH LAND TITLE INSURANCE COMPANY and NORTHWESTERN ABSTRACT COMPANY INC.	:	NO. 90-3856

AND NOW, this 14th day of June, 1991, upon consideration of the defendants' Motion to Dismiss, and the plaintiffs' response thereto, it is hereby ORDERED that the defendants' Motion to Dismiss is GRANTED.

Judgment is entered in favor of the defendants, Industrial Valley Title Company, et al., and against the plaintiffs, Anne Marie Smith, et al.

BY THE COURT:

_____

JOSEPH L. McGLYNN, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE MARIE SMITH, individually and on behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
INDUSTRIAL VALLEY TITLE COMPANY	:	NO. 90-2132
GARY VOLINER and CINDY VOLINER, h/w, individually and on behalf of Persons similarly Situated	:	CIVIL ACTION
v.	:	
CHICAGO TITLE INSURANCE COMPANY and PROFESSIONAL ABSTRACT and ASSURANCE CORP	:	NO. 90-2175
MAY FRANKEL, individually and on behalf of a Class of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CONTINENTAL TITLE INSURANCE COMPANY and LEGAL ABSTRACT COMPANY	:	NO. 90-2971

CAROLYN BURNS, as Executrix of the Estate of JULIETTE L. ECHOLS, Deceased, et al.	:	CIVIL ACTION
v.	:	
COMMONWEALTH LAND TITLE INSURANCE COMPANY and NORTHWESTERN ABSTRACT COMPANY INC.	:	NO. 90-3856

These actions were removed to this court in March, April and June 1990, and were later consolidated for pretrial purposes. In each action, the plaintiffs, individually and on behalf of a class of persons similarly situated, allege that they were charged real estate reporting fees in violation of Section 6045 (e)(3) of the Internal Revenue Code (IRC). The plaintiffs contend that they are entitled, as a consequence of such violations, to recover damages against the defendants under various state law causes of action.

Presently before the court is the defendants' Motion to Dismiss the plaintiffs' complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state claim upon which relief can be granted.[1] For the reasons set forth below, the defendants' Motion to Dismiss shall be granted.

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[1] The court denied a prior motion by the plaintiffs to remand this case to the state court in August of 1990. Oral argument with respect to the present motion was held on April 22, 1991.

BACKGROUND

Since November 1988, individual title insurance companies and their agents have been "real estate reporting persons" for purposes of § 6045 of the IRC.[2]

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[2] Section 6045 provides in part:

> (a) *General Rule.* --Every person doing business as a broker shall, when required by the Secretary, make a return, in accordance with such regulations as the Secretary may prescribe, showing the name and address of each customer, with such details regarding gross proceeds and such other information as the Secretary may by forms or regulations require with respect to such business.
>
> (b) *Statements to be furnished to customers.* -- Every person required to make a return under subsection (a) shall furnish to each customer whose name is required to be set forth in such return a written statement showing--
>
> (1) the name and address of the person required to make such return, and
>
> (2) the information required to be shown on such return with respect to such customer.
>
> The written statement required under the preceding sentence shall be furnished to the customer on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.
>
> . . .

(continued...)

Real estate reporting persons, when involved in a real estate transaction, are required by Subsections 6045(a) and (b) of the Internal Revenue Code to file an information return with the federal government and to send Internal Revenue Service (IRS) Form 1099 payee statements to transferor-customers. Section 6045(e)(3) of the Code, effective November 10, 1988 as Section 1015 of the Technical and Miscellaneous Revenue Act of 1988 (TAMMA), provides:

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[2](...continued)

> (e) *Return required in the case of real estate transactions.*--
>
> (1) *In general.*--In the case of a real estate transaction, the real estate reporting person shall file a return under subsection (a) and a statement under subsection (b) with respect to such transaction.
>
> (2) *Real estate reporting person.* --For purposes of this subsection, the term "real estate reporting person" means any of the following persons involved in a real estate transaction in the following order:
>
> (A) the person (including any attorney or title company) responsible for closing the transaction,
>
> (B) the mortgage lender,
>
> (C) the seller's broker,
>
> (D) the buyer's broker, or
>
> (E) such other person designated in regulations prescribed by the Secretary.

26 U.S.CA. § 6045 (West 1989).

> *Prohibition of separate charge for filing return.* -- It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

26 U.S.C.A. § 6045(e)(3) (West 1989).

The plaintiffs and the members of the class of persons that they seek to represent were parties to real estate transactions that were consummated after November 10, 1988. These transactions involved one or more of the defendants as real estate reporting persons.

According to the plaintiffs, the defendants violated § 6045 (e)(3) because the defendants "separately charged" the plaintiffs for real estate reporting costs. The plaintiffs seek to recover damages under Pennsylvania common-law causes of action for conversion, unjust enrichment, and money had and received, as well as under the Pennsylvania Unfair Trade Practice and Consumer Protection Law (UTPCPL), 73 Pa. Cons. Stat. Ann. § 201-1 *et seq.* (Purdon Supp. 1990).

The defendants deny that they have engaged in any wrongful conduct, and allege that the plaintiffs have failed to state a claim upon which relief can be granted. The defendants seek to have the plaintiffs' claim dismissed on this ground.

STANDARD OF REVIEW

The applicable standard of review for a motion to dismiss for failure to state a claim upon which relief can be granted "requires the court to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party." *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989); *See also*, *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984). It is settled law that a 12 (b)(6) Motion to Dismiss is appropriately granted only "where it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957).

DISCUSSION

In order to determine whether the plaintiffs have failed to state a claim upon which relief can be granted, the court must consider two issues: 1) Whether the plaintiffs may recover damages under state law causes of action for the defendants' alleged violations of Section 6045 of the Internal Revenue Code; and, 2) Whether the language of Section 6045 of the Internal Revenue Code can support the plaintiffs' claim that the defendants charged illegal fees for filing certain real estate reporting statements with the Internal Revenue Service.

A. Preemption

The plaintiffs may recover damages under Pennsylvania state law if the Internal Revenue Code does not preempt state law remedies.[3] Congressional intent is the touchstone for determining whether a federal law preempts a state law. *California v. Fed. Savings & Loan v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 93 L.Ed.2d 613 (1987). Congress is assumed not to have displaced state law unless: 1) Congress expressly states its intent to preempt; 2) federal law occupies the field of law in which the state statute operates; or, 3) an actual conflict exists between the state law and the federal law. *See Schneidewind v. ANR Pipeline*, 485 U.S. 293, 300, 108 S. Ct. 1145, 99 L.Ed. 2d 316 (1988); *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707, 712-13, 105 S.Ct.

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[3] In its Memorandum of Law accompanying its August 1990 Order to Deny Plaintiffs' Motion to Remand, the court assumed that the provisions of the *IRC* did not provide a private civil remedy for violations of Subsection 6045 (e)(3) because:

1) while other sections of the same chapter provided various private civil remedies to taxpayers and third parties, none of the sections provided an *express* private civil remedy for violations § 6045 (e)(3); and,

2) pursuant to the factors set out in *Cort v. Ash*, 422 U.S. 66 (1975), -- with Congressional intent being the determinative factor in the analysis-- the court found no basis in the Code, the regulations or the legislative history for concluding that Congress intended there to be an *implied* private federal remedy for violations of § 6045 (e)(3).

Because the plaintiffs do not dispute that the provisions of the *IRC* itself do not provide a private civil remedy for violations of § 6045 (e) (3), the court will focus its attention upon whether *state law* can provide private civil remedies for violations of § 6045 (e)(3).

2371, 85 L.Ed.2d 714 (1985); *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981); *Pokorny v. Ford*, 902 F.2d 1116, 1120 (3d cir. 1990). Because the first and third methods of preemption are not at issue for purposes of this Motion to Dismiss,[4] the court will focus its attention exclusively on the second method of preemption -- namely, whether Congress intended the IRC to occupy the field of law in which the Pennsylvania state laws operate.

The defendants argue that the plaintiffs' state law causes of action are preempted by the IRC because Congress intended to completely occupy the field of federal revenue legislation. Memorandum of Law in Support of Defendants' Motion to Dismiss at 9. Congress', intent to completely occupy the field of federal revenue legislation, argue the defendants, is evident from the comprehensive system of enforcement provisions in the IRC. *Id.* at 10. Not only does the IRC provide that federal courts have original jurisdiction in all civil actions involving internal revenue, *Id.* (citing 28 U.S.C. § 1340), but it also provides that any action for the collection of taxes, fines, penalties or forfeitures are prohibited unless authorized by the Secretary of the Treasury. *Id.* (citing 26 U.S.C. § 7401). Any state cause of action that punishes conduct related to the collection of taxes or the filing of informational returns, conclude the defendants, falls within the field occupied by the IRC, and should therefore be preempted. *Id.* at 11.

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[4] Both parties agree that the IRC contains no *express* preemption clause, and the defendants have not advanced the argument that the Pennsylvania state laws conflict with the IRC.

The plaintiffs contend, to the contrary, that Congress did not intend to preempt state law causes of action for violations § 6045 (e) (3) of the IRC. Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 20. The plaintiffs argue that this case is not an action for the collection of taxes, fines, penalties or forfeitures. *Id.* at 23-24. Rather, contend the plaintiffs, this case involves allegedly illegal settlement fees. *Id.* State law causes of action which provide remedies for allegedly illegal settlement fees are not preempted because their connection with the field occupied by the IRC is too tenuous, remote and peripheral to warrant preemption. *Id.* at 27. The plaintiffs also submit that the uniform enforcement of the IRC, in particular the accurate reporting of real estate proceeds, would not be threatened by the utilization of state law causes of action to redress violations of § 6045 (e)(3).

The issue the court has been asked to address is very important. It necessarily affects both the states' traditional authority to provide tort remedies to its citizens and the federal government's authority to maintain exclusive regulatory control over the national taxing scheme. *See Silkwood v. KerrMcGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L.Ed.2d 443 (1984) (Court addressed issue which affected states' traditional authority to provide tort remedies and federal government's desire to maintain exclusive regulatory authority over safety aspects of nuclear power).

When Congress legislates in an area of traditional state authority, the movant bears the heavy burden of proving that preemption "was the clear and manifest purpose of Congress." *Pacific Gas & Elec. v. Energy*

Resources Comm'n, 461 U.S. 190, 206, 103 S. Ct. 1713, 75 L.Ed.2d 752 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947)); *California v. ARC America*, 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L.Ed.2d 86, (1989). The clear and manifest purpose of Congress to preempt state law will be inferred "where the federal interest in the field is sufficiently dominant," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 300, 108 S. Ct. 1145, 99 L.Ed. 2d 316, or where the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress has left no room for supplementary state regulation." *International Paner Co. v. Ouellette*, 479 U.S. 481, 491, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987); *Rice*, 331 U.S. at 230, 67 S. Ct 1146, 91 L.Ed. 1447 (1947).

Comprehensiveness, in and of itself, is not a sufficient indicator of Congressional intent to preempt. *Pennsylvania Medical Soc'y v. Marconis*, 755 F. Supp. 1305, 1309 (W.D. Pa. 1991) (citing *Hillsborough*, 471 U.S. at 717, 105 S. Ct. 2371, 85 L.Ed.2d 714). The federal scheme must be so comprehensive that it supports the inference that Congress intended to oust state law. *Id.* (citing *Hillsborough*, 471 U.S. at 714, 105 S. Ct. 2371, 85 L.Ed.2d 714). Intent to oust state law will be inferred only if Congress necessarily intended the federal scheme to be the *exclusive* method through which to resolve certain problems. *Hillsborough*, 471 U.S. at 717, 105 S. Ct. 2371, 85 L.Ed. 2d 714.[5]

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[5] As elaborate as a federal regulatory scheme may be, "precisely because the regulatory scheme ... is so detailed, ... the absence of clear

(continued...)

It is not unprecedented for state law remedies to apply to federal laws whose substantive subject matter is an area of exclusive federal concern. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257-58, 104 S. Ct. 615, 78 L.Ed. 2d. 44 (1984) (state tort actions not preempted by exclusive federal regulation of nuclear safety); *Integrity Management Int'l v. Tombs & Sons*, 836 F.2d 485, 487 (10th Cir. 1987) (state common law actions for unjust enrichment, intentional interference with securing contract rights, and fraud and misrepresentation not preempted by federal regulation of size standards for small business procurement contracts). Thus, in this case, even if the method of determining charges for filing informational returns pursuant to § 6045 (e)(3) of the IRC is an area of exclusive federal concern, the remedies available to those harmed by real estate reporting persons who have violated § 6045 (e)(3) need not be exclusively federal.

Even assuming that the method of determining charges for filing informational returns pursuant to § 6045 (e) (3) of the IRC is an area of exclusive federal concern, Congress has provided no indication that the remedies for a violation of § 6045 (e)(3) are also an area of exclusive federal concern. Congress has spoken to the issue of exclusivity of remedies for violations of the IRC in

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[5](...continued)
preemptive language [may just as logically be interpreted] as indicative that Congress did not intend to displace state law [remedies] entirely." *Ford Motor Co. v. Insurance Comm'r*, 874 F.2d 926, 939 (3d Cir.), *cert. denied*, 110 S. Ct. 418, 107 L.Ed.2d 382 (1989).

Subchapters A and B of Chapter 76 of Title 26 of the United States Code.

Subchapter A provides that no action shall be commenced to collect or recover taxes, fines, penalties or forfeitures, or to enforce liens, to subject property to payment of tax, to recover erroneous refunds or to enjoin certain parties, unless the Secretary of the Treasury authorizes or sanctions the proceedings and the Attorney General or his delegates directs that the action be commenced. 26 U.S.C.A. §§ 7401-7409 (West 1989). Subchapter B places limitations upon the types of proceedings taxpayers and third parties are allowed to initiate. Specifically limited are actions to restrain the assessment or collection of any tax and actions to recover erroneously or illegally collected taxes. 26 U.S.C.A. §§ 7421, 7422 (West 1989).

The plaintiffs in this case are not bringing an action to recover taxes, collect fines or penalties, or to enforce a forfeiture or lien, they are simply bringing an action for damages against the defendants based on theories of tort liability for being charged a fee in violation of § 6045 (e)(3). Because the plaintiffs' tort-based causes of action are not mentioned in the Subchapters pertaining to the exclusivity of certain federal remedies, and because tort-based remedies are areas of traditional state authority, the court cannot infer that Congress necessarily intended the federal revenue scheme to be the *exclusive* method through which to resolve cases alleging violations of § 6045 (e)(3).

Because the court cannot infer that Congress necessarily intended the federal revenue scheme to be the

exclusive method through which to resolve cases alleging violations of § 6045 (e)(3), the plaintiffs' tort-based causes of action are not preempted by the IRC, and the court will now turn to the remaining issue of whether the plaintiffs' claim for relief can be supported by the language of § 6045 (e) (3).

B. Statutory Interpretation of IRC § 6045 (e)(3)

Section 6045 (e)(3) states:

> Prohibition of separate charge for filing return.-- It shall be unlawful for any real estate reporting person to *separately charge* any customer for complying with any requirement of paragraph (1).

26 U.S.C.A. § 6045 (e)(3) (West 1989) (emphasis added).

The plaintiffs concede that the term "separately charge" does not prohibit real estate reporting persons from making *any* charge for the filing of a Form 1099 payee statement with the IRS. *See* Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 11-12. What the plaintiffs do take issue with is *how* these charges are to be assessed. *See id.*

The plaintiffs contend that the term "separately charge" indicates that Congress intended to prohibit only the passing on of *certain* real estate closing charges. *Id.* at 11-12. The plaintiffs argue that Congress used the term "separately charge" in an attempt to implement a real estate reporting scheme whereby real estate reporting

persons would break down the costs of complying with § 6045 into two component parts: 1) overhead related costs; and, 2) non-overhead related costs. *Id.* Overhead costs would include "the clerical, postage and/or magnetic media costs associated with IRS reporting." *Id.* at 11. Non-overhead related costs would include, by implication, everything else.

Because Congress intended overhead costs to be non"separate" charges, argue the plaintiffs, real estate reporting persons would be permitted to pass these costs on to the customer without violating the provisions of § 6045 (e) (3). *See Id.* at 12. However, because Congress intended non-overhead related costs to be "separate" charges, any real estate reporting person who attempted to recover these costs from the customer would be charging a fee in violation of § 6045 (e) (3). *See id.*

The defendants contend that the plain language of §6045 (e)(3) does not support the plaintiffs' interpretation of the term "separately charge." Defendants' Reply Memorandum to Plaintiffs' Answer to Defendants' Motion to Dismiss at 7. The term "separately charge," given its literal interpretation, argue the defendants, prohibits a separate, "line item" charge for complying with the IRC reporting requirements, but does not prohibit the collection of a fee levied in conjunction with other general service charges. Memorandum of Law in Support of Defendants' Motion to Dismiss at 5. The defendants assert that their interpretation of the term "separately charge" reflects the "literal" meaning of § 6045 (e)(3), and that the "literal" meaning of § 6045 (e) (3) should control its interpretation because the legislative history of § 6045 (e) (3) does not suggest a contrary

legislative intent.[6] Defendants' Reply Memorandum to

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[6] The parties also argue that, in order to discern the meaning of the term "separately charge," another statute, the Real Estate Settlement and Procedures Act (RESPA), should be read in pari materia with § 6045 (e) (3). Memorandum of Law in Support of Defendants' Motion to Dismiss at 23; *See* Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 7-8. The parties argue that statutes which relate to the same subject matter are in pari materia, and must be construed together, "as if they were one law." Memorandum of Law in Support of Defendants' Motion to Dismiss at 23 (citing *United States v. Stewart*, 311 U.S. 60, 64, 61 S. Ct. 102, 85 L.Ed. 2d 40 (1940) (quoting *United States v. Freeman*, 44 U.S. 556, 564-65, 11 L.Ed.2d 724 (1845)); Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 7-10. Because TAMRA and RESPA relate to the same subject matter, *i.e.*, the extent to which real estate reporting persons may charge their customers for real estate closing fees, the parties suggest that RESPA can aid in determining the meaning of the ten "separately charge." *See id.*

After a close reading of *United States v. Stewart*, it appears to the court that the parties have misapplied the standard calculated therein. In *Stewart* the United States Supreme Court was asked to determine whether gains realized after the sale of certain farm loan bonds were taxable income. *Stewart*, 311 U.S. at 61-62. A significant part of the Court's analysis focused on the statutory interpretation of the term "income derived." *Id.* at 63-65. In order to resolve this issue, the Court looked to the Revenue Act of 1916. *Id.* at 64. When the Revenue Act of 1916 failed to provide the Court with a clear interpretation of the term "income derived," the Court turned to the provisions of the Revenue Act of 1928. *Id.* at 64-65.

The Supreme Court stated that because the Revenue Act of 1916 and the Revenue Act of 1928 "dealt with precisely the same subject matter, viz., the scope of the tax exemption afforded farm loan bonds," the two Acts were in pari materia. *Id.* at 64. Because the Acts were in pari materia, "[t]he *later act* c[ould] therefore be regarded as a *legislative*

(continued...)

Plaintiffs' Answer to Defendants' Motion to Dismiss at 7.

In order to resolve the dispute between the parties, the court must determine the extent to which real estate reporting persons can recover § 6045 reporting fees without violating § 6045 (e) (3). The court's inquiry begins, as it must, with the language of the statute itself. *United States v. Ron Pair Enter.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L.Ed.2d 290, (1989). The language of § 6045 (e)(3) states that "[i]t [is] unlawful for any real estate reporting person to *separately charge* any customer for complying" with any § 6045 requirements. 26 U.S.C.A. § 6045 (e)(3) (West 1989) (emphasis added).

"Separate," as defined in the *Oxford English Dictionary*, (2d Ed. 1989), means "parted, divided, or withdrawn from others; disjointed, disconnected, detached or kept apart." A "separate" charge, therefore, is one that is disconnected or apart from others.

The defendants did not disconnect or separate § 6045 fees from other closing charges. All closing charges,

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[6](...continued)
interpretation of the earlier act in the sense that it [would] aid[] in ascertaining the meaning of the words as used in their contemporary setting." *Id.* (citations omitted) (emphasis added).

In the case *sub judice*, the parties are asking the court to consult an *earlier act* in order to discern the *legislative intent of a later act*. Because this proposition is at odds with the standard articulated by the Supreme Court in *Stewart*, the court will not look to the provisions of RESPA in order to determine the interpretation to be given the later-enacted TAMRA term "separately charge."

including the § 6045 fees, were charged collectively as general service charges.

To argue that the language of § 6045 (e)(3) prohibits charging for § 6045 fees *at all* or *in certain part* goes well beyond the plain meaning of the language of the statute. The scheme suggested by the plaintiffs is far too attenuated from the literal interpretation of the language of § 6045 (e) (3) to be unconditionally accepted by the court as indicative of Congressional intent. The statutory term "separately charge," without more, does not demonstrate that Congress intended real estate reporting persons to separate costs into overhead and nonoverhead components before passing them on to their customers.

The plain meaning of a statute should be conclusive except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enter.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290, (1989) (citing *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 73 L.Ed.2d 973 (1982)). In these rare cases, the intent of the drafters, rather than the plain meaning of the language of the statute controls. *Id.* Unless the plain meaning of the term "separately charge" can be shown to be at variance with the intent of the drafters of § 6045 (e)(3), the plaintiffs' argument is without merit.

The legislative history of § 6045 states that, with respect to § 6045 (e)(3), "it [is] unlawful for any real estate reporting person to charge separately any customer for complying with the information reporting requirements with

respect to real estate transactions." S. Rep. No. 100-445, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News 4515, 4890. The legislative history does not demonstrate that the drafters of § 6045 (e) (3) intended the statute to have a meaning different from its literal application. Absent any apparent Congressional intent to the contrary, the term "separately charge" must be given its literal interpretation. The court finds that the literal interpretation of the term "separately charge" means that real estate reporting persons may charge their customers for the costs of complying with § 6045 of the IRC so long as the costs are not disconnected, detached or kept apart from other closing charges.

Because the defendants did not "separately charge" the plaintiffs for § 6045 closing fees in violation of § 6045 (e) (3), the plaintiffs have failed to state a claim upon which relief can be granted. The defendants' Motion to Dismiss shall therefore be granted.

IV. CONCLUSION

Although the plaintiffs' state law causes of action are not preempted by the IRC, the plaintiffs have failed to state a claim upon which relief can be granted. The defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12 (b) (6) shall therefore be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE MARIE SMITH, Individually and on Behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
INDUSTRIAL VALLEY TITLE COMPANY	:	NO. 90-2132
GARY VOLINER and CINDY VOLINER, h/w, Individually and on Behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CHICAGO TITLE INSURANCE COMPANY and PROFESSIONAL ABSTRACT and ASSURANCE CORP.	:	NO. 90-2175
MAY FRANKEL, Individually and on Behalf of a Class of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CONTINENTAL TITLE INSURANCE COMPANY and LEGAL ABSTRACT COMPANY	:	NO. 90-2971

CAROLYN BURNS, as Executrix of the Estate of JULIETTE L. ECHOLS, Deceased, et al.	:	CIVIL ACTION
v.	:	
COMMONWEALTH LAND TITLE INSURANCE COMPANY and NORTHWESTERN ABSTRACT COMPANY INC.	:	NO. 90-3856

MEMORANDUM OF DECISION

McGLYNN, J. AUGUST 2, 1990

These actions were removed to this court in March, April, and June 1990 and were later consolidated for pretrial purposes. In each action, plaintiffs individually and on behalf of a class of similarly situated persons allege that they were charged real estate reporting fees in violation of Section 6045 of the Internal Revenue Code (I.R.C.). Plaintiffs contend that they are entitled, as a consequence of such violations, to recover damages against defendants under various state-law causes of action. The question before the court is whether the actions fail to arise under federal law and should be remanded to the Court of Comon Pleas of Philadelphia County pursuant to 28 US.CA. § 1447(c).[1]

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[1] That subsection of title 28 provides:

(continued...)

Because the court concludes that a substantial, disputed question concerning Section 6045 forms a necessary element of each of the state-law causes of action, the court has subject matter jurisdiction pursuant to 28 U.S.C.A. § 1331, and plaintiffs' motions to remand will be denied.

BACKGROUND AND PROCEDURAL HISTORY

The complaints in each of the four actions were filed in the Court of Common Pleas of Philadelphia County in March 1990. Each complaint avers that, since November 1988, individual defendant title insurance companies and their agents have been "real estate reporting persons" under I.R.C. § 6045.[2] As real state reporting

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[1](...continued)

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). *If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.* An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 US.CA. § 1447(c) (West Supp. 1990) (emphasis added).

[2] Section 6045 provides in part:

(continued...)

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[2](...continued)

(a) *General Rule.* --Every person doing business as a broker shall, when required by the Secretary, make a return, in accordance with such regulations as the Secretary may prescribe, showing the name and address of each customer, with such details regarding gross proceeds and such other information as the Secretary may by forms or regulations require with respect to such business.

(b) *Statements to be furnished to customers.* -- Every person required to make a return under subsection (a) shall furnish to each customer whose name is required to be set forth in such return a written statement showing--

(1) the name and address of the person required to make such return, and

(2) the information required to be shown on such return with respect to such customer.

The written statement required under the preceding sentence shall be furnished to the customer on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

. . .

(e) *Return required in the case of real estate transactions.--*

(1) In general. --In the case of a real estate transaction, the real estate reporting person shall file a return under subsection (a) and a statement under

(continued...)

persons, defendants, when involved in a real estate transaction, are required by Subsections 6045(a) and (b) of the Internal Revenue Code to file an information return with the federal government and to send I.R.S. Form 1099 payee statements to transferor-customers. Subsection 6045(e) (3) of the Code, effective November 10, 1988 as Section 1015 of the Technical and Miscellaneous Revenue Act of 1988, provides:

> *Prohibition of separate charge for filing return.*--It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

I.R.C. § 6045(e) (3) (West Supp. 1990). According to plaintiffs, that subsection makes it illegal for a real estate

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[2](...continued)

subsection (b) with respect to such transaction.
(2) *Real estate reporting person.* --For purposes of this subsection, the term "real estate reporting person" means any of the following persons involved in a real estate transaction in the following order:

(A) the person (including any attorney or title company) responsible for closing the transaction,
(B) the mortgage lender,
(C) the seller's broker,
(D) the buyer's broker, or
(E) such other person designated in regulations prescribed by the Secretary.

26 U.S.C. § 6045.

reporting person to charge *any fee* for compliance with the reporting requirements of section 6045. *See* Smith Complaint ¶ 8; Voliner Complaint ¶ 12; Frankel Complaint ¶ 12; Burns Complaint ¶ 12.

Plaintiffs and the members of the class of persons that they seek to represent were parties to real estate transactions that were consummated after November 10, 1988 and that involved one or more of the defendants as title insurers or settlement agents. Plaintiffs aver that defendants charged fees arising out of those transactions for fulfilling the reporting requirements of Section 6045. See Smith Complaint ¶ 13; Voliner Complaint ¶ 17; Frankel Complaint ¶ 17; Burns Complaint ¶ 17. Such fees, plaintiffs allege, were "contrary to law." See Smith Complaint ¶¶ 15, 17, 18, 23, 46; Voliner Complaint ¶¶ 19, 21, 22, 27, 50; Frankel Complaint ¶¶ 19, 21, 22, 27, 50; Burns Complaint ¶¶ 19, 21, 22. Plaintiffs therefore seek to recover damages both for themselves and for prospective class members under Pennsylvania common-law causes of action for conversion, unjust enrichment, and money had and received, as well as under the Pennsylvania Unfair Trade Practice and Consumer Protection Law (UTPCPL), 73 Pa. Cons. Stat. Ann. § 201-1 *et seq.* (Purdon Supp. 1990).

An essential element of each of those state-law causes of action is a showing of wrongful, illegal conduct. Under Pennsylvania law, "A conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent *and without lawful justification*." *Stevenson v. Economy Bank of Ambridge.*, 413 Pa. 442, 451, 197 A.2d 721, 726 (1964) (emphasis added); *accord Schonberger v.*

Oswell, 365 Pa. Super. 481, 484, 530 A.2d 112; 114 (1987). Money may be the subject of conversion. *Schonberger*, 365 Pa. Super. at 484, 530 A.2d at 114. To sustain a claim of unjust enrichment,

> [A] claimant must show that the party against whom recovery is sought either "*wrongfully secured* or passively received a benefit that it would be unconscionable for her to retain." "In order to recover, there must be *both* (1) an enrichment, and (2) *an injustice resulting* if recovery for the enrichment is denied."

Torchia v. Torchia, 346 Pa. Super. 229, 233, 499 A.2d 581, 582-83 (1985) (citations omitted) (emphasis added); *accord Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987). Additionally, with regard to a claim for money had and received, "where one has . . . money which in equity and good conscience *belongs and ought to be paid to another*, an action for money had and received will lie for the recovery thereof." *First National Bank v. Carroll Township*, 150 Pa. Super. 241, 246, 27 A.2d 527, 530 (1942) (emphasis added). "'[A] person is not permitted to profit by *his own wrong* at the expense of another.' . . . By 'wrong' is meant . . . *the violation of another's legal right.*" *Greek Catholic Congregation of Borough of Olyphant v. Plummer*, 347 Pa. 351, 353, 32 A.2d 299, 300 (1943) (emphasis added).

Finally, the Pennsylvania UTPCPL expressly provides a private cause of action to remedy "a method, act or practice declared by section 3 of [the] act." 73 Pa. Cons. Stat. Ann. § 201-9.2 (Purdon Supp. 1990) (emphasis added).

Section 3 of the UTPCPL declares *unlawful* the seventeen "unfair methods of competition" and "unfair or deceptive acts or practices" set forth in the subclauses of clause (4) of section 2 of the act, among whim is subclause (xvii). That subclause proscribes "Engaging in any . . . *fraudulent conduct* which creates a likelihood of confusion or of misunderstanding." *See* 73 Pa. Cons. Stat. Ann. §§ 201-2(4), 201-3 (Purdon Supp. 1990) (emphasis added); *see also Commonwealth v. Monumental Properties. Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 826-27 (1974) (the phrase "fraudulent conduct" should be construed broadly to make all "mischief caused by unfair and deceptive market practices" unlawful).

In their notices of removal that were filed in March, April, and June 1990, defendants aver the following: that plaintiffs' causes of action are "premised upon ... allegation[s] that defendant[s] violated a federal statute, 26 U.S.C. § 6045"; that the court, consequently, has original jurisdiction under 28 U.S.C. § 1331; and that removal was, therefore, proper under 28 U.S.C. § 1441.[3] Plaintiffs responded with their motions to remand, in which they contend that no federal remedy is involved in the actions, that the complaints are not well-pleaded, that the language of Subsection 6045(e) (3) is unambiguous, and that, as a result, plaintiffs' claims do not arise under federal law. Hence, plaintiffs assert, removal was improper.

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[3] Defendants did not rely upon either 28 U.S.C. § 1337 or 28 U.S.C. § 1340 as grounds for the court's subject matter jurisdiction.

DISCUSSION

The Jurisdiction of the federal courts is limited. "[T]he fair presumption is . . . that a cause is without [the] jurisdiction [of the court], until the contrary appears." *Turner v. Bank of North Am.*, 4 Dall. 8, 10, 1 L.Ed. 718, 719 (1799). Moreover, when a party wishes to remove a case from state to federal court, the removal statute has been strictly interpreted. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L.Ed. 1214 (1941); *see also Donofry v. Nazareth Hosp.*, 721 F. Supp. 732, 733-34 (E.D. Pa. 1989).

Removal of civil actions from state to federal court is governed by 28 U.S.C.A. § 1441 (West 1973 & Supp. 1990). Section 1441(a) provides in part:

> Except as othervise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants[ ] to the district court of the United States for the district and division embracing the place where such action is pending.

There is no diversity of citizenship between the parties to any of the instant actions. Therefore, original jurisdiction must rest on a federal question. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96

L.Ed.2d 318 (1987); *see also Krashna v. Oliver Realty, Inc.*, 895 F.2d 111, 113 (3d Cir. 1990).

Under the federal-question statute, the district courts have original jurisdiction of all civil actions "arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331. As the Supreme Court has stated, "[e]specially when considered in light of . . . § 1441[ ][,] the phrase 'arising under' *masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.*" *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8, 103 S. Ct. 2841, 2846, 77 L.Ed. 2d 420, 430 (1983); *accord Merrell Dow Pharmaceuticals. Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L.Ed.2d 650, 658 (1986). "In order for a case to be removable under § 1441 and § 1331, the well-pleaded complaint rule requires [that] the federal question be presented on the face of the *plaintiff's* properly pleaded complaint." *Railway Labor Executives Ass'n v. Pittsburgh & L.E.R.R.*, 858 F.2d 936, 939 (3d Cir. 1988) (emphasis added) (citations omitted); *see Caterpillar*, 482 U.S. at 392, 107 S. Ct. at 2429, 96 L.Ed. 2d at 327. "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392, 107 S. Ct. at 2429, 96 L.Ed. 2d at 327. It follows that an action may not be removed on the basis of a federal defense, even if the defense is anticipated in the complaint. *Id.* at 393, 107 S. Ct. at 2430, 96 L.Ed.2d at 327; *see Krashna*, 895 F.2d at 113.

A line of Supreme Court authority nevertheless establishes that a limited class of claims brought

under state-law causes of action may "arise under" federal law "if vindication of the state right necessarily turns upon construction of a substantial question of federal law, i.e., if federal law is a necessary element of one of the well-pleaded [state-law] claims." *Ulramar Am. Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990). That line of authority bears directly on whether plaintiffs' claims arise under federal law in these actions.

In 1916, Justice Holmes stated his now familiar definition of the statutory "arising under" limitation: "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 586, 60 L.Ed. 987, 989 (1916). That test, which describes the vast majority of cases coming within the district courts' original jurisdiction (those in which the plaintiff states a federal cause of action), has since been found to be more helpful as an inclusionary than as an exclusionary test. *see, e.g., Franchise Tax Board*, 463 U.S. at 9, 103 S. Ct. at 2846, 77 L.Ed. 2d at 430.

To be sure, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S. Ct. 243, 65 L.Ed. 577 (1921), the Court rejected the Holmes test as a limit on federal-question jurisdiction where federal law was indirectly involved in well-pleaded state-law causes of action. In that case, a shareholder sued the defendant corporation, its directors and officers, to enjoin the corporation from investing funds in farm loan bonds. Banks had issued such bonds under authority of the Federal Farm Loan Act of 1916. The shareholder sought his state-law injunctive relief on the grounds that the Act was unconstitutional and that the bonds were, consequently, illegal; he contended that the

corporation could invest only in legal securities. The directors responded that the Act was constitutional and that the investment was legal and would be favorable to the corporation. Because no diversity of citizenship existed between the parties, the Court confronted the issue whether the action arose under federal law and was countenanced by the predecessor statute to 28 U.S.C. § 1331, Judicial Code § 24.

In holding that the action did arise under the Constitution and laws of the United States, the Court reasoned:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the *right to relief depends upon the construction or application of the Constitution or laws of the United States*, and that such Federal claim is *not merely colorable*, and rests upon a reasonable foundation, the district court has jurisdiction . . . . It is . . . apparent that the controversy concerns the constitutional validity of an act of Congress which is *directly drawn in question*. The decision *depends upon the determination of* this issue.

Smith, 255 U.S. at 199, 201, 65 L.Ed. at 585, 586 (emphasis added).

Thirteen years after *Smith*, the Supreme Court addressed the question whether a district court has original jurisdiction *whenever* a plaintiff pleads a state-law cause of

action that incorporates a federal-law element. In *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205, 54 S. Ct. 402, 78 L.Ed. 755 (1934), the plaintiff switchman alleged that he had been injured while working on railroad tracks used in interstate commerce. The use of the tracks in interstate commerce made the Federal Employers' Liability Act (FELA) and the Federal Safety Appliance Acts apply of their own force in administrative actions; those statutes did not, however, provide private civil remedies. The plaintiff therefore additionally alleged that he had been involved in intrastate commerce when injured, and he sued under the Kentucky Employers' Liability Act and the Federal Safety Appliance Acts. Before the Court were venue questions and the question whether jurisdiction was based only upon diversity of citizenship or also upon claims arising under the Federal Safety Appliance Acts.

The Kentucky Act, which created a state-law remedy for the plaintiff's injury, provided that "no employee should be held 'to have been guilty of contributory negligence' or 'to have assumed the risk of his employment' in any case 'where the violation by [the] common carrier *of any statute, state or Federal*, enacted for the safety of employees, contributed to the injury or death of such employee'." *Moore*, 291 U.S. at 212-13, 54 S. Ct. at 404-05, 78 L.Ed. at 761 (emphasis added). The Court concluded that "the Federal Safety Appliance Acts were manifestly embraced in this description" and that a violation of those Acts "was to constitute negligence per se in applying the [Kentucky Act] and was to furnish the ground for precluding the defense of contributory negligence as well as that of assumption of risk." *Id.*

In holding that the only basis for jurisdiction in the suit was diversity of citizenship, the Court stated:

> Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, Federal questions which may appropriately be reviewed *in this* [Supreme] *Court*. But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the Federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the Federal court in the absence of diversity of citizenship.

Id. at 214, 78 L.Ed. at 762 (citations omitted) (emphasis added); *see Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317, 319 (E.D. Pa. 1982) (speculating that *Moore* may be explained as a case in which the complaint was not well-pleaded: that is, violations of the Federal Safety Appliance Acts were pleaded in order to anticipate the defendant's defenses of contributory negligence and assumption of risk).

In its "arising under" decisions that followed *Moore*, the Court expanded upon the *Smith* rule but declined to reconcile explicitly that rule with the holding in *Moore*. For example, in *Gully v. First National Bank*, 299 U.S. 109,

57 S. Ct. 96, 81 L.Ed. 70 (1936), the Court reasoned that to bring a case within the purview of § 1331,

> a right or immunity created by the Constitution or laws of the United States must be an *element*, and an *essential one*, of the plaintiff's cause of action. . . . [The case must] *really and substantially involve[ ] a dispute or controversy respecting the validity. construction or effect of . . . a law [of the United States], upon the determination of which the result depends.*
>
> . . .
>
> This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. . . . [T]here has been a selective process which *picks the substantial causes out* of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal

> statute or in the Constitution itself. . . . To set bounds to the pursuit, *the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible*. We shall be lost in a maze if we put that compass by.

Gully, 299 U.S. at 112, 114, 117, 81 L.Ed. at 72, 73, 74-75 (citations omitted) (emphasis added); *accord Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974) (action arises under federal law if complaint seeks a remedy that requires the construction of a federal statute).

The "eye to practicality and necessity" with which the Court in *Gully* viewed § 1331 remained open in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983). Writing for the majority in *Franchise Tax Board*, Justice Brennan stated that, because state law created the causes of action under which the plaintiff sought recovery, "original federal jurisdiction is unavailable unless it appears that *some substantial, disputed question of federal law is a necessary element* of one of the well-pleaded state claims . . . ." *Franchise Tax Board*, 463 U.S. at 13, 103 S. Ct. at 2848, 77 L.Ed.2d at 433 (emphasis added). A substantial question of federal law concerning the Employee Retirement Income Security Act (ERISA) was apparent from the face of the plaintiff's complaint. Justice Brennan nonetheless concluded for the majority that the complaint suggested "many reasons completely unrelated to the provisions and purposes of ERISA why the [plaintiff] may or may not be entitled to the relief it seeks." *Id.* at 25-26, 103 S. Ct. at 2855, 77 L.Ed.

2d at 441. Thus, the ERISA question was not a "necessary element" of the well-pleaded state-law claims, and the district court did not have federal-question jurisdiction. *Accord Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808, 108 S. Ct. 2166, 2173, 100 L.Ed. 811, 825 (1988) (in an action involving § 1338 "arising under" jurisdiction, Court quoted with approval language from *Franchise Tax Board* finding federal-question jurisdiction where "plaintiff 's right to relief depends necessarily on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded . . . claims").

Although it clarified the test for "arising under" jurisdiction, Justice Brennan's *Franchise Tax Board* opinion was not the final word on that test. Indeed, all roads in the Court's indirect federal-question jurisprudence eventually intersect in *Merrell Dow Pharmaceuticals. Inc. v. Thompson*, 478 U.S. 804, 106 S. Ct. 3229, 92 L.Ed.2d 650 (1986), a somewhat delphic 5 to 4 decision from which Justice Brennan dissented. In *Merrell Dow*, plaintiffs had alleged in two separate complaints that children had been born with deformities resulting from their mothers' ingestion of the drug Bendectin during pregnancy. In five of the six counts in each complaint, recovery was sought against the manufacturer of the drug on state common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In the other count, the plaintiffs alleged that Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FOCA). Such misbranding, they alleged, "constitute[d] a rebuttable presumption of negligence." Assuming that the FDCA did provide a private federal remedy for the alleged violation, the Court framed

the question with which it was presented as "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States . . .'" *Merrell Dow*, 473 U.S. at 805, 106 S. Ct. at 3230, 92 L.Ed. 2d at 656.

Reciting the "need for [the same] prudence and restraint" in its jurisdictional inquiry that had characterized its approach in *Franchise Tax Board*, the Court found of telling importance its assumption that Congress had not provided a private federal remedy for violations of the FDCA. The Court stated that, just as providing a federal remedy for violation of the statute would "flout Congressional intent," so would that intent be similarly flouted were federal courts allowed to exercise federal-question jurisdiction over state-law causes of action that simply made violation of the FDCA a "rebuttable presumption of negligence." *Id.* at 812, 106 S. Ct. at 3234, 92 L.Ed. 2d at 661.

But the Court did not set forth a bright-line rule that federal courts are without federal-question jurisdiction whenever such Jurisdiction hinges upon a state-law cause of action with a federal-law element for which Congress has provided no private remedy. Instead, in footnotes and in its textual response to the plaintiffs' arguments in support of jurisdiction, the Court cautiously demarcated a faint boundary at the frontier of federal-question jurisdiction that embraces a limited class of such actions.

In response to the plaintiffs' reliance on the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims," the *Merrell Dow* Court reasoned:

> *Franchise Tax Board* . . . did not purport to disturb the long-settled understanding that the *mere presence* of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.

Id. at 813, 106 S. Ct. at 3234, 92 L.Ed. 2d at 661 (emphasis added). The Court elaborated upon the meaning of "mere presence" in a footnote in which it quoted from *Gully* and from Justice Frankfurter's dissenting opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). From Justice Frankfurter's dissent, the Court borrowed the following definition of its jurisdictional inquiry: "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote." *Id.* at 813 n.11, 106 S. Ct. at 3234 n.11, 92 L.Ed.2d at 661 n.11 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 47-77 S. Ct. 912, 1 L.Ed.2d 972 (1957) (Frankfurter, J., dissenting)). From *Gully*, the Court repeated the distinction "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible." *Id.* The Court then echoed the emphasis in *Franchise Tax Board* and *Gully* on "principled, pragmatic distinctions" and on picking "the *substantial* causes out of the web and lay[ing] the other ones aside." *Id.* at 813-14, 106 S. Ct. at 3234-35, 92 L.Ed. 2d at 662.

Finally, the Court set forth its carefully worded, fact-specific conclusion:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that *the presence* of a claimed violation of the statute as an element of a state cause of action is *insufficiently "substantial"* to confer federal-question jurisdiction.

Id. at 814, 106 S. Ct. at 3235, 92 L.Ed.2d at 662 (emphasis added). Light was shed on the meaning of that conclusion and its use of the words "presence" and "substantial" in footnote 12 of *Merrell Dow*, in which the Court intimated that its § 1331 decisions can best be understood as an evaluation of the "nature" of the "federal interest" at stake. As the Court stated,

> Focusing on the nature of the federal interest . . . suggests that the widely perceived "irreconcilable" conflict between the finding of federal jurisdiction in *Smith* . . . and the finding of no jurisdiction in *Moore* . . . is far from clear. *For the difference in results can be seen as manifestations of the differences in the nature of the federal issues at stake.* In *Smith* . . . the issue was the constitutionality of an important federal statute. In *Moore* . . . the violation of the federal standard . . . did not fundamentally change the *state tort nature* of the action.

Id. at 814-15 n.12, 106 S. Ct. at 3235 n.12, 92 L.Ed.2d at 662 n.12 (citations omitted) (emphasis added). *See also id.* at 820, 106 S. Ct. at 3238, 92 L.Ed.2d at 666 (Brennan, J., dissenting) ("The continuing vitality of *Smith* is beyond challenge"). Thus, in *Merrell Dow* the FDCA element was "merely present" in the plaintiffs' complaints, and the actions did not arise under federal law for the following reasons: the actions remained "state" in nature; relief could have been granted solely on state-law grounds; federal law served insubstantially as a rebuttable presumption of negligence in only one of the six counts of each complaint; and Congress had not provided a federal remedy for violations of that federal law.

Indirect federal-question jurisdiction cases that have been decided in the wake of *Merrell Dow* have recognized the continuing vitality of the *Smith-Gully-Franchise Tax Board* "arising under" test and have been guided by *Merrell Dow's* charge to the federal courts to examine "the *nature* of the federal interest at stake" to determine whether a state-law cause of action that relies in part on federal law can "arise under" federal law for jurisdictional purposes. *See e.g., Ultramar Am. Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990) (concluding that alternative theories of relief, each not dependent upon federal law, existed for each claim alleged in complaint, and therefore there was no federal-question jurisdiction because right to relief did not *necessarily depend* upon construction of substantial question of federal law); *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783, 788-89 (6th Cir. 1989) (distinguishing *Merrell Dow*, in which "plaintiffs failed to prove that their relief *depended necessarily* on a substantial question of federal law" and in which "no specific and

compelling federal interest was demonstrated," from the case before it in which a finding of federal-question jurisdiction was "entirely consistent with the specific federal interest in the protection of motor carriers and the historical federal interest in the regulation of interstate commerce); *Donofry v. Nazareth Hosp.*, 721 F. Supp. 732, 734-35 (E.D. Pa. 1989) (court did not have jurisdiction where it would not have to pass upon the validity, construction, or effect of the federal law to decide the case, and where the rights claimed by the plaintiffs would not be altered by the court's construction of the federal law); *Glass Molders Int'l Union v. Wickes Co.*, 707 F. Supp. 174, 179-80 (D.N.J. 1989) (action did not arise under federal law where plaintiffs' complaint clearly did not place exclusive reliance on federal law, federal law was not a "necessary element" of the complaint,. and, in light of *Merrell Dow*, the "nature" of the interest at stake was not significantly federal); *Wilkinson v. United States*, 724 F. Supp. 1200, 1203-04 (W.D.N.C. 1989) (in action brought under state law to quiet title, the construction of federal law concerning the validity and priority of an I.R.S. tax lien was the "central issue" raised in the complaint, and court exercised federal-question jurisdiction, but court cited no Supreme Court cases); *cf. Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317, 319 (E.D. Pa. 1982) (decided before *Franchise Tax Board* and *Merrell Dow*, and declining to exercise federal-question jurisdiction where "the *essential Pennsylvania elements* of [the] suit . . . would be more appropriately dealt with by" the state court). *But see Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) (reading *Merrell Dow* to hold that the existence of a private federal remedy is a necessary predicate to determining that the presence of a federal element in a state-created cause of

action results in that cause of action being one that arises under federal law).

For purposes of this decision, the court will assume that the Internal Revenue Code does not provide a private remedy for violations of Subsection 6045(e) (3).[4]

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[4] The Code provides that persons who do not comply with Subsection 6045(e) and fail to file an information return or payee statement must pay a civil penalty. I.R.C. §§ 6721, 6722. Those persons who fail to include correct information in such returns and statements are likewise required to pay a civil penalty. I.R.C. § 6723. Additionally, Section 7203 of the Code provides criminal penalties for willful failures to file returns or to supply information. I.R.C. § 7203. While Subchapter B of Chapter 76 of the Code expressly provides various private civil remedies to taxpayers and third parties, none of the sections in that subchapter provides an express private civil remedy for violations of Subsection 6045(e) (3).

Given the presence of civil remedy provisions in the Code and the absence of an express private remedy provision for violations of Subsection 6045(e) (3), my assumption that there is no implied private cause of action in the Code for such violations rests on firm ground. As the Supreme Court has stated, "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors. Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L.Ed.2d 146, 154-55 (1979); *accord Lechtner v. Brownyard*, 679 F.2d 322, 326 (3d Cir. 1982). Although the Supreme Court has stated that, in attempting to ascertain whether an implied private remedy exists under a federal statute, a court should analyze the four factors first identified in *Cort v. Ash*, 422 U.S. 66 (1975), the Court has also stated that the second *Cort* factor--Congressional intent-

(continued...)

Even with that assumption, the court concludes that it has federal-question jurisdiction over these four actions.

In each action, the alleged violations of Subsection 6045(e) (3) are not "merely present" in the state-law causes of action. In order for the plaintiffs to recover under Pennsylvania common-law causes of action for conversion, unjust enrichment, and money had and received, as well as under the UTPCPL, the plaintiffs must prove that defendants charged a reporting fee that violated Section 6045. Hence, a violation of Section 6045 is a necessary

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[4](...continued)

-is determinative in such analyses, with the remaining factors merely indicative of the presence or absence of Congressional intent. *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 23, 100 S. Ct. at 249, 62 L.Ed.2d at 157; *Thompson v. Thompson*, 484 U.S. 174, 188-90, 108 S. Ct. 513, 521, 98 L.Ed. 2d 512, 526 (1988) (Scalia, J., concurring); *accord Bakerstown Container Corp. v. International Bhd. of Teamsters*, 884 F.2d 105, 108 n.2 (3d Cir. 1989).

I have found no basis in the Code, the regulations, or the legislative history for concluding that Congress intended there to be an implied private federal remedy for violations of Subsection 6045(e). See 26 C.F.R., Part I, § 1.6045-3T (1989); 1988 U.S. CODE CONG. & ADMIN. NEWS 4515, 4530, 100th Cong., 2d Sess., vol.6 ("The technical correction titles . . . contain clerical, conforming amendments . . . [and] are meant to carry out the intent of Congress in enacting the original [Tax Reform Act of 1986]. Therefore, no separate "Reasons for Change" is set forth for each individual amendment."). Without looking to the three additional *Cort* factors, therefore, I assume that no implied private remedy exists for violations of Subsection 6045(e) (3).

element of each of plaintiffs' well-pleaded state-law causes of action, and is in the forefront of the plaintiffs' complaints.

Moreover, the meaning of Subsection 6045(e)(3) is in dispute between the parties. The plaintiffs' right to relief necessarily depends upon whether the Court construes that provision to prohibit the charging of *any* fee for real estate reporting costs and services, *or* only a "separate" fee--for example, a fee for filing an information return and sending a payee statement that is separate from a fee for preparing that return and statement. Thus, the dispute between the parties over the meaning of Subsection 6045(e)(3) and its use of the word "separate" is not merely possible or collateral. That dispute is the core of these actions. Whether defendants will be found to have violated Section 6045 depends upon the court's resolution of that dispute.

Finally, the dispute over the meaning of Subsection 6045(e)(3) is substantial in *nature*. To be sure, Section 6045 is invested with a weighty federal interest: Congress has mandated that the I.R.S. and parties to real estate transactions be provided with accurate information returns and payee statements setting forth clearly certain details of the transactions that might bear on the amount of a taxpayer-transferor's taxable income. Significantly, information statements put a transferor on notice both that the I.R.S. has been provided with a Form 1099 concerning a real estate transaction in which the transferor has been involved and that the transferor might be required to report the specific items listed in that form on his annual return. By enacting Subsection 6045(e)(3), Congress has concluded that the charging of a fee for fulfilling the reporting requirements of section 6045 may affect the accuracy,

regular filing, and distribution of those important statements and returns. This court's determination of the extent to which defendants, as real estate reporting persons, can charge for fulfilling the requirements of Section 6045 will therefore directly impact upon the specific federal interest in ensuring accurate, regular filings of real estate reporting documents.

Thus, a substantial question concerning Section 6045 is a necessary element of the plaintiffs' well-pleaded state-law claims and is in dispute between the parties. Accordingly, with an eye to practicality, necessity, the proper relation of state and federal courts, and the proper management of the federal system, the court concludes that the exercise of federal-question jurisdiction over these actions is appropriate under § 1331 and § 1441.

CONCLUSION

For the reasons stated above, plaintiffs' motions to remand these actions to the Court of Common Pleas of Philadelphia County will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNE MARIE SMITH, Individually and on Behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
INDUSTRIAL VALLEY TITLE INSURANCE COMPANY	:	NO. 90-2132

GARY VOLINER and CINDY VOLINER, h/w, Individually and on Behalf of Persons Similarly Situated	:	CIVIL ACTION
v.	:	
CHICAGO TITLE INSURANCE COMPANY and PROFESSIONAL ABSTRACT AND ASSURANCE CORP.	:	NO. 90-2175

MAY FRANKEL, Individually and on Behalf of a Class of Persons Similarly Situated	:	CIVIL ACTION
v.	:	

CONTINENTAL TITLE INSURANCE COMPANY and LEGAL ABSTRACT COMPANY	:	NO. 90-2971

CAROLYN BURNS, as Executrix of the Estate of JULIETTE L. ECHOLS, Deceased, et al.	:	CIVIL ACTION
v.	:	
COMMONWEALTH LAND TITLE INSURANCE COMPANY and NORTHWESTERN ABSTRACT COMPANY, INC.	:	NO. 90-3856

ORDER

AND NOW, this 2nd day of August, 1990, upon consideration of the motions of the plaintiffs to remand these four actions to the Court of Common Pleas of Philadelphia County and the defendants' responses thereto, and for the reasons set forth in the accompanying memorandum, it is

ORDERED

that the motions are DENIED.

BY THE COURT

JOSEPH L. McGLYNN, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1555

ANNE MARIE SMITH, Individually and on
Behalf of Persons Similarly Situated,
Appellant

V.

INDUSTRIAL VALLEY TITLE INSURANCE COMPANY

No. 91-1556

GARY VOLINER and CINDY VOLINER,
Husband and Wife, Individually and on
Behalf of Persons Similarly Situated,
Appellants

V.

CHICAGO TITLE INSURANCE COMPANY
PROFESSIONAL ABSTRACT AND ASSURANCE CORP.

No. 91-1557

MAY FRANKEL, Individually and on Behalf of
a Class of Persons Similarly Situated,
Appellant

V.

CONTINENTAL TITLE INSURANCE COMPANY
LEGAL ABSTRACT COMPANY

No. 91-1558

CAROLYN BURNS, as Executrix of the
Estate of Juliette L. Echols, Deceased
ATTILIO J. CHIARROCCHI, as Chiarrocchi, Deceased
MAU THI LE, Individually and on Behalf of
Persons Similarly Situated,
Appellants

V.

COMMONWEALTH LAND TITLE INSURANCE COMPANY
NORTHWESTERN ABSTRACT COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 90-02132, 90-02175, 90-02971, 90-03856)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, *Circuit Judges*, and WEIS*, *Senior Circuit Judge*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

*Judge Weis voted only on panel rehearing.

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Cowen would grant rehearing for the reasons set forth in his dissent.

By the Court,

_____

Circuit Judge

Dated: April 2, 1992

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

(2)

No. 91-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH LAND TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

CAROLYN BURNS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly followed this Court's holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), in ruling that state law consumer class actions should be remanded to state court, where the claims were based on the Pennsylvania consumer protection statute and common law, and defendants' alleged violation of a federal statute was an element of the state law claims.

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COUNTER-STATEMENT OF THE CASE

Because the District Court's final judgment order, vacated by the Court of Appeals, granted a Motion to Dismiss under Fed.R.Civ.P. 12(b)(6), the allegations of the Complaints must be accepted as facts.

The plaintiffs are individuals who sold homes after November 10, 1988. [Complaints, App. 6a, 60a, 82a, 105a]. That date is the effective date of the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647 ["TAMRA"]. TAMRA added the following to the Internal Revenue Code's reporting provisions governing real estate transactions, at subsection (e) of 28 U.S.C. § 6045:[1]

> **(3) Prohibition of separate charge for filing return.**-- It shall be unlawful for any real estate reporting person to separately charge any customer for complying with any requirement of paragraph (1).

---

[1] Section 6045(e) was added to § 6045 in 1986. Act of Oct. 22, 1986, P.L. 99-514, § 1521(a), 100 Stat. 2746. This subsection extended § 6045(a) and (b)'s reporting requirements, previously imposed on "brokers," to real estate transactions. The new provision identified the party handling the closing who was required to give 1099-type forms to homesellers and file information returns with the IRS, showing the proceeds of home sales.

It is undisputed that this statute, as amended, did not give homesellers a private federal cause of action to recover illegally charged fees.

The defendants were "real estate reporting persons" who provided the IRS information statements mandated by § 6045(e)(1). [Complaints, App. 4a-5a, 57a-59a, 79a-81a, 101a-03a]. Each defendant collected a charge for "IRS reporting," although the charge was not shown as a separate line item on the settlement sheets. [Complaints, App. 6a, 61a, 105a, 83a].

Under the Pennsylvania regulations governing title services, a title company or affiliated abstract company may charge a "disbursement fee" for the clerical service of issuing checks from the proceeds of a home sale. The permissible amount of that charge depends on the number of checks issued, to a maximum of $15.00. [Complaints, App. 61a, 83a, 105a].

Each defendant collected a combined IRS reporting and disbursement fee exceeding $15.00. While the precise amount each defendant collected for "IRS reporting" (as opposed to the "disbursement fee") has not yet been established, the total amounts charged to the various plaintiffs varied from $17.50 to $50.00.

The common law counts of the Complaints sought recovery of the fees, with interest and punitive damages, on grounds that defendants were liable for conversion, unjust enrichment, and money had and received. [Complaints, App. 7a, 62a, 83a, 106a]. The statutory

counts alleged that defendants' conduct was unfair and deceptive within the meaning of Pennsylvania's Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat. § 201-2(4) ["UTPCPL"]. Plaintiffs stated a private cause of action expressly provided by the UTPCPL, 73 Pa.Stat. § 201-9.2(a), providing triple damages and additional remedies. [Complaints, App. 9a, 64a, 85a-86a, 108a].

In the final counts of their Complaints, plaintiffs sought to represent a class of similarly situated homesellers who were charged an IRS reporting fee since November 10, 1988. [Complaints, App. 10a, 64a, 86a, 112a].

Thus, the underlying dispute is between two sets of private parties, homesellers versus the providers of real estate closing services.[2] No party has raised any issue or concern about the performance of any tax reporting or collecting duties, or the accuracy of the returns, or the validity of state rules or federal law. The homeseller plaintiffs simply seek civil damages under

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[2] Plaintiffs contended below that the ban on "separate" charges was violated when defendants added a specific amount to a line item in the closing charges and that evident Congressional intent to prevent profiteering for complying with the reporting requirements could not be so easily frustrated. Defendants contended that they could conceal the breakdown of the distinct charge for IRS reporting from the consumer, by adding it to a "disbursement fee," and thereby complied with the statute while charging whatever amount they pleased.

state law arising from an allegedly improper settlement charge imposed by the title companies.

In applying the principles identified by this Court in *Merrell Dow*, to hold that the title companies improperly removed these class actions, the Third Circuit Court of Appeals made the following observation:

> Moreover, in this case, no matter what interpretation the Pennsylvania courts might give this particular provision of the Internal Revenue Code, it will have no effect whatsoever on the collection of tax by the United States. No federal precedent will be set by state courts in this circumstance, so even inconsistent interpretations of this provision among the states will not affect federal jurisprudence in any way. It is simply that Pennsylvania plaintiffs have pleaded a state-law cause of action for violating a provision of federal law for which there is otherwise no private right of action.

957 F.2d 90, 94 (App., 14a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S RULING IS A STRAIGHTFORWARD, CORRECT APPLICATION OF THIS COURT'S *MERRELL DOW* DECISION

A. *Merrell Dow* Decision Was Not Ambiguous In Identifying Congressional Intent As Decisive Factor To Substantiality Of Federal Issue For Jurisdictional Purposes

In holding that federal question jurisdiction was absent in these cases, the Court of Appeals for the Third Circuit honored both the letter and intent of this Court's 1986 decision in *Merrell Dow*. This Court's explicit ruling left no doubt that what the District Court termed "indirect" federal question jurisdiction — where an issue of federal law was merely an element of a state law cause of action — could only be found in exceptional circumstances.

Far from misinterpreting *Merrell Dow*, the Third Circuit took this Court's opinion to mean what it said and applied the plain, compelling language of that decision:

> The significance of the necessary assumption that there is no federal private

> cause of action thus **cannot be overstated**. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think **it would similarly flout, or at least undermine**, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.

478 U.S. at 811-12 (emphasis added). This passage is important because it undermines the Petitioners' argument that labelling the violation of a federal statute as a "necessary" or "essential" element of the state law causes of action overrides the fact that Congress has not seen fit to express or imply a federal remedy. This explains why it is the Petitioners, not the Court of Appeals, who have misinterpreted *Merrell Dow*'s relationship to prior case law.[3]

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[3] The line of cases from *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) to *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) remain valid for their (continued...)

Elsewhere in *Merrell Dow*, this Court reinforced this point, stating:

> Given the significance of the assumed congressional determination to preclude federal private remedies, the **presence of the federal issue as an element of the state tort is not the kind of adjudication** for which jurisdiction would serve congressional purposes and the federal system. . . . the congressional determination that there should be no federal remedy for the violation of this

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[3](...continued)

recognition that only a "substantial" federal issue will support federal-question jurisdiction. But the fact that these cases were not overruled in *Merrell Dow* does not mean that they stand for a distinct, alternative basis for subject-matter jurisdiction, under which the "congressional determination" whether to provide an federal remedy is irrelevant.

Rather, the holding of *Merrell Dow* requires that the question whether the issue in a given case is "substantial", thereby meeting the established criterion, must now be analyzed with reference to the signal significance of the Congressional mandate. The strong terms — "cannot be overstated," "flout", "tantamount" — which this Court employed to describe the importance of the legislative factor make this conclusion irresistible. "Federal courts cannot create indirectly what Congress did not provide directly — namely, a federal forum for the privately asserted federal violations in this case." *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196, 199 (4th Cir., 1991), *cert. denied*, 112 S.Ct. 1173 (1992).

> federal statute is **tantamount** to a congressional conclusion that the **presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial"** to confer federal-question jurisdiction.

478 U.S. at 814 (emphasis added). The final holding of the *Merrell Dow* opinion contained no ambiguity:

> We conclude that **a complaint alleging a violation of a federal statute as an element** of a state cause of action, when Congress has determined that there should be **no private, federal cause of action** for the violation, **does not state a claim "arising under** the Constitution, laws, or treaties of the United States."

478 U.S. at 817 (emphasis added).

Given this mandate, the Court of Appeals did not err in declining the Petitioners' invitation to search for a basis to "flout" manifest Congressional intent. Congress' determination that the new ban on IRS reporting charges need not be administered by the federal judiciary is especially fitting in the context of real estate transactions.

B. State Law Consumer Class Actions Over Real Estate Closing Costs Belong In State Court

In these lawsuits between private consumers and title insurance companies, the greatest out-of-pocket losses sought by any named plaintiff is less than $50, before considering the effect of treble damages and the $100 minimum award under the Pennsylvania consumer protection statute. 73 Pa.Stat. § 201-9.2(a). As the Third Circuit Court noted, whatever decision the state court may make in adjusting the allegedly illegal closing costs between these private parties, there will be no impact on the compilation of information or collection of taxes by the Internal Revenue Service.

In our federal system, of all matters which are committed to the states, perhaps the most appropriately so committed are the systems for protecting and transferring ownership of the very real estate over which each state is sovereign.

Thus, when federal law regulated abuses of concealment and overcharging in closing costs, Congress was careful to preserve the states' autonomy.

The savings clause of the Real Estate Settlement and Procedures Act, 12 U.S.C. § 2601 et seq, provides that all state laws with respect to settlement practices are unaffected (unless inconsistent with federal law, and then only to the extent of the inconsistency, and a state law

cannot be inconsistent if it provides greater protection). 12 U.S.C. § 2616.

Given this public policy background, it can be inferred that Congress made a prudent and informed decision, when banning "separate charges" in the TAMRA amendment, to leave enforcement of this ban to the states' existing, extensive scheme of regulation.

In *Merrell Dow*, this Court explained why the basis for federal question jurisdiction avowed by the Petitioners is so fragile:

> Indeed, the very reasons for the development of the modern implied remedy doctrine — the "increased complexity of federal legislation and the increased volume of federal litigation," as well as "the desirability of a more careful scrutiny of legislative intent," *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377, 102 S.Ct. 1825, 1838, 72 L.Ed.2d 182 (1982) (footnote omitted) — are precisely the kind of considerations that should inform the concern for "practicality and necessity" that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action.

Merrell Dow, 478 U.S. at 811-12.

These concerns are illustrated in the present cases, consumer class actions where the basic claim for most class members is unlikely to exceed the $100 minimum award under the Pennsylvania Consumer Protection Act. There is no **practical** benefit in forcing federal courts to adjudicate thousands of claims arising from separate home sales transactions, based on state common law and statutory law controlling the remedies.

And since title companies doing business nationwide manage with fifty different systems of deed recording, indexing, transfer taxation, escrowing, and insurance regulation, they will certainly be able to adapt their procedures if different states were to vary in applying the ban on "separate charges". There is no **necessity** for federal courts to interpret the meaning of "separately charge," even assuming that federal jurisdiction would infallibly promote uniformity.

Moreover, there is no reason to assume that inconsistent interpretations are more likely to develop in the state courts than in lower federal courts. This Court's certiorari review is equally possible from either forum. As this Court pointed out in *Merrell Dow*, such review is available if inconsistent interpretations among state courts were to threaten important federal interests. 478 U.S. at 816.

II. PURPORTED "CONFLICT" BETWEEN CIRCUITS ONLY REFLECTS TRULY EXCEPTIONAL CHARACTER OF STATE LAW CASES WARRANTING FEDERAL JURISDICTION

Merrell Dow sufficiently clarified the boundaries of federal-question jurisdiction over state law claims alleging violations of a federal statute as an element of the claim, where there is no private federal remedy. A Westlaw search for decisions from all federal courts, issued from January 1, 1992 until May 29, 1992, revealed only two rulings of the Circuit Courts of Appeals citing *Merrell Dow* in connection with a jurisdictional question, not counting the Third Circuit's decision in the present case.[4] An additional five District Court decisions were reported in the same period.[5]

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[4] *Hudson Insurance Co. v. American Electric Corp.*, 957 F.2d 826 (11th Cir., 1992) (underlying question one of state, not federal, law); *Cable Television Association Of New York v. Finneran*, 954 F.2d 91 (2d Cir. 1992) (injunctive relief supports federal jurisdiction, so substantiality of federal issues need not be decided).

[5] *Coardes v. Chrysler Corporation*, 785 F.Supp. 480 (D. Del. 1992) (negligence claim against vehicle manufacturer did not arise under federal law); *Stone v. Williams*, 1992 WL 96197 (M.D. Ala. 1992) (suit to enforce state-court judgment allocating share of legendary country singer's estate remanded to state court); *Platzer v. Sloan-Kettering Institute for Cancer Research*, 1992 WL 62134 (S.D.N.Y. 1992) (implied federal remedy claim supported

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Only one of these decisions evidenced any inconsistency in interpreting or applying the principles outlined in *Merrell Dow*.[6] This hardly suggests a volume of

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[5](...continued)

finding of jurisdiction); *Ore-Ida Foods v. Richmond Transportation Services*, 783 F.Supp. 382 (N.D. Ill., 1992) (shipper's action against insurers for damaged goods dismissed); *Laubach v. Howard Trucking Co.*, 1992 WL 28107 (E.D.La. 1992) (tort suit alleging violations of trucking safety regulations remanded where Congress did not create federal remedy for such violations).

[6] *Platzer v. Sloan-Kettering*, 1992 WL 62134, was a claim by medical researchers for a larger share of royalties on their discovery. The District Court found federal jurisdiction present over three counts based on a federal statute requiring non-profit organizations which accept federal funding to share royalties which inventors. The first count asserted an implied direct right of action under the federal statute, for which "it is well settled that . . . federal courts have the requisite federal jurisdiction to determine whether such a federal remedy exists." 1992 WL 62134, at *3.

Although rejecting the implied remedy claim on its merits, the District Court went on to exercise jurisdiction over the second and third counts, on grounds that "the federal issue is essential to Plaintiffs' breach of contract and third-party beneficiary claims." In so holding, the *Paltzer* court cited *Milan Express* and the decision of the District Court, since reversed, in the present case. *Id.* at *6.

Because *Paltzer*, unlike this case, did present an issue whether the federal statute provided an implied private right of action, the federal question was far more substantial and significant

(continued...)

controversy or confusion warranting renewed attention by this Court.

Scrutiny of the cases discussed by Petitioners reveals that only one of those decisions actually upheld federal-question jurisdiction in the absence of a federal remedy — *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989). In that case, the Sixth Circuit panel majority, over a vigorous dissent, found jurisdiction under 28 U.S.C. § 1337(a) over claims based on surety bonds which were "created on federal forms, administered under federal regulations, and required by a federal statute." Thus, the transaction in that case was entirely a creature of federal law. Here, in contrast, real estate transactions are controlled and primarily regulated by state law.

Whether or not *Milan Express* was correct in asserting federal jurisdiction, standing alone that decision does not warrant certiorari review of the ruling in this case.

The remaining cases cited by Petitioners, where federal jurisdiction was found, uniformly presented

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[6](...continued)

there. The rarity of cases comparable to *Paltzer*, in either factual patterns or jurisdictional holdings, illustrate that the issue asserted in the Petition for Certiorari is not ripe for review. The great majority of courts have been faithful to the straightforward language of *Merrell Dow*.

additional bases for jurisdiction, frequently in the form of a companion federal remedy.[7] Thus, Petitioners' effort to demonstrate a conflict among the circuits relies on extrapolation from *dicta* and inference.

Merrell Dow has not left an unsettled question of great importance requiring still more clarification from this Court. Instead, *Merrell Dow* has endowed federal-question jurisprudence with a widely and consistently applied rule. Such clear guidance is especially welcome in the complex area of federal-question jurisdiction.

A spirit of deference to Congressional intent underlies the rationale of *Merrell Dow*. Hence, Congressional acquiescence in the six years since that decision is especially significant. Congress has the ability, when it legislates in any given subject area, to expressly vest subject-matter jurisdiction in the federal courts, and knows, pursuant to *Merrell Dow*, that interpretation and enforcement may be left to state courts

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[7] The latest decision from the Second Circuit did not reach the question whether the federal issues involved in state cable television regulations were sufficient to warrant federal question jurisdiction, but suggested that they would not be. *Cable Television Association Of New York v. Finneran*, 954 F.2d at 94, citing *Nashoba Communications v. Town of Danvers*, 893 F.2d 435, 438 (1st Cir. 1990) (no substantial federal issue in cable company's federal pre-emption challenge to municipal enforcement of rate freeze). Thus, the Second Circuit has yet to decide a case which squarely raises a question of *Merrell Dow*'s "unreserved application."

unless it does so. It is for Congress in the first instance, exercising its legislative function, to balance the federal interests and determine the limits of federal jurisdiction over civil claims involving violations of federal laws.

Thus, *Merrell Dow* gives certainty and predictability to the jurisdictional implications of Congressional action in specific subject areas. Furthermore, if Congress concluded that the general rule of *Merrell Dow* unduly limited the ability of federal courts to extend subject-matter jurisdiction on a case-by-case basis, Congress could have revised the Judicial Code to broaden so-called "indirect" federal question jurisdiction. However, Congress has **narrowed** such jurisdiction in the context of removal. In 1990, 28 U.S.C. § 1441(c) was amended to give the District Court discretion to remand "all matters in which State law predominates," even if a clear basis for federal jurisdiction exists. P.L. No. 101-650 (December 1, 1990). *Martin v. Drummond Coal Co., Inc.*, 756 F.Supp. 524, 526 (N.D. Alabama 1991) (amendment reflects consensus on need to subtract substantially from removal jurisdiction). This amendment, in and of itself, further lessens the need for further refinement of doctrine on the remote boundaries of federal question jurisdiction.

In conclusion, the Third Circuit correctly followed the express holding of this Court in *Merrell Dow* when it held that these state law class actions should be remanded to state court. If, as a theoretical matter, exceptionally compelling circumstances will still permit

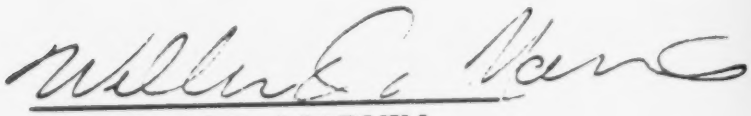
federal-question jurisdiction in the absence of a federal remedy, the boundaries of such exceptional circumstances should be defined in the context of a case which arguably presents them.

This is manifestly not such a case.

III. CONCLUSION

For the reasons discussed above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,



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